Supreme Court, U.S.
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071028 JAN 3 - 2008
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No. _____

In The
Supreme Court of the United States

PANORAMA, INC.,

Petitioner,

v.

ZOMBA ENTERPRISES, INC.
and ZOMBA SONGS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 3, 2008

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QUESTIONS PRESENTED

Did the Sixth Circuit err in holding that Copyright statutory infringement damages which are 44 times the actual damages do not offend the Fifth Amendment Due Process or Eighth Amendment Excessive Fines Clauses?

Does the Copyright Clause, U.S. Const. art. I, § 8, cl. 8, bar a copyright holder from refusing to license karaoke versions of songs?

Did the Sixth Circuit err when it held that commercial use "militated" against a finding of Fair Use; and that the effect upon the "end user" or consumer was "irrelevant" in Fair Use analysis, ignoring *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 114 S. Ct. 1164, 1170 (1994), and *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984)?

Did the Sixth Circuit err when it held that karaoke did not "teach" lyrics within the meaning of the 17 U.S.C. §107 "teaching" example, because it was "entertainment" and therefore not transformative?

Was the Sixth Circuit required to take judicial notice of a recent ruling of the European Union antitrust regulators invalidating a merger of appellee's corporate owners on anti-competitive grounds, and six similar co-pending suits filed in the same court, as part of its Fair Use analysis?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Sixth Circuit were petitioner Panorama, Inc., debtor in possession pursuant to chapter 11 of the Bankruptcy Code, and Zomba Enterprises, Inc. and its wholly owned subsidiary, Zomba Songs, Inc, which is a wholly owned subsidiary of BMG Music Publishing, Inc, a privately held corporation. No party is a subsidiary or affiliate of a publically owned corporation.

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JURISDICTION

The judgement of the United States Court of Appeals for the Sixth Circuit was issued on June 26, 2007, and a petition for rehearing *en banc* was denied on October 5, 2007. This Court has jurisdiction over this petition under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be

> twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

17 U.S.C. §107 provides:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> > (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> >
> > (2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. §504(c) provides:

(c) Statutory Damages.—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its

> discretion may increase the award of statutory damages to a sum of not more than $150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $250.

STATEMENT OF THE CASE

This case is important to victims of aggressive copyright holders who seek exorbitant statutory damages in federal courts; to all people who believe that copyright should promote, not impede "the Progress of Science and useful Arts"[1], and finally, to the karaoke industry.[2]

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[1] U.S. Const. art. I, § 8, cl. 8.

[2] Karaoke has established itself as a social phenomenon. It has also been depicted in a variety of movies and television shows, including the 1996 comedy "The Cable Guy"; the 1997 romantic comedy "My Best Friend's Wedding"; the 1997 Korean gangster comedy "No. 3"; the 2000 movie "Duets"; the 2001 film "Jackpot"; the 2003 film "Lost in Translation"; the 2004 film "Rush Hour 2"; the 2006 Disney film "High School Musical"; and several episodes of the TV show "Angel." The New York Times reported its popularity in 1998 "NOTICED; Karaoke: Once More, With Irony" by Julia Chaplin, N.Y. Times, July 5, 1998. ("Karaoke is a release, and people tend to get very emotional without even realizing it.") The importance of karaoke to society can be amply illustrated by the hit show "American Idol", and a video game spinoff, "Karaoke

Petitioner Panorama, Inc., a small Boston firm, was found to have infringed the music and lyrics of 26 hit songs by making and selling karaoke compact discs that are in a format known as "CD+G" (compact disc plus graphics), without having a film synchronization license (or "film synch"). After granting summary judgment against Panorama's Fair Use defense, the district court assessed statutory damages for "willful infringement" of $31,000 per copyright, for an $806,000 award, plus attorneys fees, which was affirmed on appeal after *en banc* consideration was denied. The evidence at trial indicated damages of approximately $28,000 at best. Since petitioner has produced thousands of tracks over the last years, this award exposes him to potential statutory damage liability in the *hundreds of millions of dollars.*

This case emanates from the Sixth Circuit, the same court that was reversed in *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 114 S. Ct. 1164, 1170 (1994) for taking too restrictive a view of Fair Use. They are still taking too restrictive a view, thus creating a conflict with the Ninth Circuit, and also refusing to apply constitutional punitive damage limitations to statutory damage awards, against the trend of authority.

Panorama hires musicians to record a "cover version" of hit songs, which it then duplicates onto

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Revolution Presents: American Idol" for PlayStation 2, whose ads proclaim "Think You're The Next 'Idol'? New Video Game Lets Simon, Randy Be The Judges," http://www.mtv.com/news/articles/1539164/20060822/id_0.jhtm,l (last visited Dec. 20, 2007).

CD+G discs, along with the text of each song's lyrics scrolling across a screen as the music plays (normally sans vocals), viewable when played on a karaoke machine. This permits participants to read the lyrics as they sing along with familiar melodies, the essence of karaoke. Each of Panorama's karaoke packages contained ten songs, with two tracks for each song, one released with audible lyrics and one without. They can also be listened to without lyrics scrolling on a regular CD player.

Normally, a compact disc manufacturer or a performing artist does not need to negotiate rights with a song publisher in order to manufacture vocal "cover versions" or even instrumental versions of hit songs, because the Copyright Act, 17 U.S.C. §115, provides a compulsory license for making and distributing phonorecords (including compact discs), at a set rate. The license includes the "privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work...." Copyright Act, 17 U.S.C. §115.

This longstanding statutory regime, which goes back to the era of piano rolls and the 1909 Copyright Act, was originally set up to prevent a song publisher monopoly.[3]

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[3] *Statement of Marybeth Peters The Register of Copyrights, before the Subcommittee on Courts, The Internet and Intellectual Property of the House Committee on the Judiciary, United States*

The difference between a §115 compulsory licence for phonorecords and a film synchronization license ("film synchs") for karaoke CD+G is more than just money. The publishers must license their musical works for mechanical duplication (*i.e.*, records, tapes, compact discs, etc.) to anyone who asks, pursuant to §115, in exchange for a statutorily set royalty rate. They are free to refuse, however, requests for film synchs.

Petitioner's position, which was shared by many in the karaoke industry, was that since it was not in the film business, it should not have to pay a film synch royalty; that it had the right to make a karaoke rendition of a song on a compact disc with or without permission of the copyright owner or songwriter under the Fair Use provisions of 17 U.S.C. §107, since a CD+G disc did not compete in the same market as compact audio discs or printed sheet music, and was designed to allow a person to instantaneously sing a song in public that he had not memorized the lyrics to, which was a kind of "teaching" expressly sanctioned by the statute.[4] In that manner, petitioner maintained that it was "transformative" within the meaning of *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994)[5]

House of Representatives 108th Congress, 2d Session, March 11, 2004, http://www.copyright.gov/docs/regstat031104.html (last visited Dec 20, 2007).

[4] *See* 17 U.S.C. §107, *supra*.

[5] One music commentator listed karaoke prominently on a list of activities that transform music. *See* http://wayneandwax.blogspot.com/2005/09/transformative-uses.html (last visited Dec. 20, 2007).

Further, since 17 U.S.C. §115 otherwise allows petitioner to sell "phonorecords" (a term defined in 17 U.S.C. §101, which includes sounds "other than those accompanying a motion picture or other audiovisual work,") at a statutorily set license rate,[6] that to allow publishers to control all karaoke versions of the songs they own, or to charge prohibitively excessive "fixing fees" as part of a film synchronization license, would give them a virtual monopoly over the entire karaoke industry, an unwarranted extension of the copyright monopoly, as well as patent-like control over the manufacture of karaoke compact discs.[7]

The entire issue of "transformative uses" is a hot topic among today's musicians. *See* "Remix, Reuse, Repercussions: A Discussion about Transformative Use", an ad for a 2005 seminar, http://www.futureofmusic.org/events/summit05/transformative.cfm (last visited Dec. 20, 2007) ("But in recent years, appropriation, sampling, and transformative use have raised sticky legal questions in the music world.... Has the increased litigation had an impact on artists' ability to transform existing works?...").

[6] Currently $0.091 per copy sold, as per Copyright Arbitration Royalty Panel. Rates are published at http://www.copyright.gov/carp/m200a.pdf (last visited Dec. 20, 2007). Panorama is currently selling discs and escrowing this amount with bankruptcy court approval, pending determination of this case.

[7] In addition to Fair Use, Panorama asserted on appeal a number of other issues, which the court deemed waived, despite Panorama's proceeding pro se and its Chapter 11 filing. Specifically, that Zomba's copyrights violate "the idea/expression dichotomy," are subject to compulsory licensing, constitute copyright misuse, *de minimis* usage, and accordingly not actionable. Petitioner's position is that these issues were not only

On January 13, 2003, Panorama was sued in Nashville for copyright infringement by Zomba Enterprises and Zomba Songs, Inc., a wholly owned subsidiary of BMG Music Publishing, Inc. ("Zomba/BMG"), a private German owned music publisher who publically boasted of owning one third of the world's copyrights, for distributing compact discs containing 26 copyrighted musical compositions without having a "film synchronization license" to include a display of the lyrics of 26 songs along with the music audio on petitioner's CD+G discs. At least six karaoke disc manufacturers were sued simultaneously in the same court, App. 63a, as part of what petitioner claimed was a concerted effort to gain control of the karaoke disc industry, which was heretofore operated by a number of small firms, most of which did not pay film synchronization royalties.

Zomba/BMG could rely upon a 1996 Second Circuit case of first impression, *Abkco Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 64 (2d Cir. 1996), which upheld the right of a publisher to withhold permission for all karaoke uses on the theory that a "film synch right" is actually a right of reproduction of the lyrics pursuant to 17 U.S.C. §106(1). The *Abkco* court did not confront or discuss Fair Use or any other public policy considerations, and was apparently unconcerned that the publisher of the Rolling Stone's hits "Satisfaction",

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preserved, but should have been part of the Fair Use analysis anyway, which was clearly not waived.

"Jumpin Jack Flash", and "Brown Sugar" had refused to license these songs for karaoke at any price.[8]

The parties filed cross-motions for summary judgment but before the district court ruled, Panorama's counsel withdrew on May 10, 2004. On June 18, 2004, the district court granted Zomba's, and denied Panorama's motion for summary judgment on the issue of copyright infringement, nominally applying *Campbell v. Acuff-Rose Music,* 510 U.S. 569 (1994) and rejecting Panorama's fair-use defense, thus following *Abkco Music, Inc. v. Stellar Records, Inc.* on the issue of the necessity of a film sync license for karaoke discs.

In its opinion, the district court relied not only upon 17 U.S.C. §107 and *Campbell v. Acuff-Rose,* but also *Princeton University Press v. Michigan Document Services,* 99 F.3d 1381 (6th Cir. 1996), a case with four dissents concerning commercial copy machines printing student course packs for college students, which attempted to apply the *Acuff-Rose* factors in analyzing a Fair Use case. *Princeton* stands for the

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[8] *Abkco* has been disavowed by at least one other court. On May 21, 2007, the District of Utah held that a film synch licence was not required for karoake. *EMI Entertainment World, Inc. v. Praddis Music, Inc.*, 2007 U.S. Dist. Lexis 37074, held that synchronization licenses are required only where music is played in relation to a moving picture or series of pictures, such as a movie, television show, or music video. Scrolling words that changed color on the screen in time with the music were not "pictures" that required such a license. EMI has indicated that it will appeal the ruling. http://www.gordonrees.com/news/inCourt_072407b.cfm (last visited Dec. 23, 2007).

proposition that in analyzing a commercial Fair Use case, the use put to defendant's products by its customers is irrelevant (a proposition not advanced by *Acuff-Rose,* and which contradicts *Sony Corp. of America v. Universal Studios Inc.*, 464 U.S. 417 (1984), the "*Beta Max*" case).

As *Acuff-Rose* made abundantly clear, if a use is sufficiently transformative, it may be a Fair Use despite being commercial. But the district court's opinion exalted commerciality over all else when it stated:

> Defendant argues that Karaoke is a form of free expression and creativity which should not be subject to licensing. Defendant maintains that Karaoke products are new, innovative, transformed works which are produced in a different medium, for a different purpose, and in a different market than Plaintiff's copyrighted materials. As explained above, however, the Court finds that Defendant's use of the subject compositions is commercial.

(App. 55a.)

Having already departed from *Beta Max* in finding Panorama's customer's use irrelevant (App. 54a), the district court compounded the error when it concluded:

> Karaoke is not transformative, however. Defendant uses, in its product, the entire musical composition copyrighted by Plaintiffs. The lyrics and the music are the same....

> Defendant does not change the lyrics or the underlying musical composition.

(App. 55a.)

This criticism seems bizarre and unfair when one considers that the compulsory license section, 17 U.S.C. §115, *prevents* changing the lyrics and music as a condition of the license, which includes only the "privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work...." Copyright Act, 17 U.S.C. §115. Damned if Panorama does, damned if it doesn't.

By following *Princeton University Press* and not considering "end user" as in *Beta Max*, the district court could not have possibly considered the beneficial effects of the use on society, and therefore ignored the first principle of copyright, "to promote the Progress of Science and useful Arts", as *Acuff-Rose* mandates, which the Ninth Circuit did in *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007), and *Kelly v. Aribasoft,* 336 F.3d 811 (9th Cir. 2003), and which the Sixth Circuit did not do in *Princeton University Press*. In contrast, the *Perfect 10* court elevated Fair Use and actually shifted the burden to disprove Fair Use to the copyright holder who asks for an injunction, which was not done here.

To determine damages, the district court scheduled a bench trial for August 10, 2004. Panorama was unable to obtain new counsel and consequently failed

to file any of the required pretrial documents or to appear at the pretrial conference held on July 29, 2004. The district court accordingly entered a default against Panorama on the issue of damages. Panorama responded by filing for bankruptcy in the Bankruptcy Court for the District of Massachusetts on August 9, 2004. In response, the district court stayed the case. After the bankruptcy court lifted its stay, Panorama moved the district court to transfer the case to either the bankruptcy court, the U.S. District Court for the District of Massachusetts, or the U.S. District Court for the Southern District of New York. The district court denied this motion on August 9, 2005. On November 5, 2005, the district court held a hearing to determine the amount of damages.

Regarding application of the statutory damage section of the Copyright Act, 17 U.S.C. §504[9], as a preliminary matter, the district court (and the Sixth Circuit) took a novel view as to its proper application. As petitioner reads the statutory damages provision, all infringements, willful or not are subject to the range of $750 to $30,000 pursuant to 17 U.S.C. §504(c)(1), except that in willful cases, the court has discretion to increase the award to $150,000 per infringement. *See* 17 U.S.C. §504(c)(1) and (2). The district court and the Sixth Circuit read "willfulness" as virtually requiring an award in excess of $30,000, or at least giving the judge absolute discretion to exceed $30,000 without explanation for his "upward departure". (App. 21a.) In other words, petitioner could have been found willful and still be liable for as low as

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[9] *See* 17 U.S.C. §504(c), *supra*.

$750.00 per infringement under the statute. Yet the district court (and the Sixth Circuit) erroneously stated that "the maximum statutory amount of $30,000 for "innocent infringement" is not sufficient in this case because of the clearly willful nature of Defendant's conduct". (App. 21a.)

On December 5, 2005, the district court issued findings of fact and conclusions of law, concluding that Panorama's infringement was willful, and accordingly awarded Zomba $31,000 for each of the twenty-six infringements at issue, for a total of $806,000. On January 23, 2006, the district court also awarded Zomba $76,456.16 in attorney fees and $1058.91 in costs.

The actual lost profits put into evidence were no more that $28,151.78, so that the statutory damages assessed by the judge were between 29 and 44 times the compensatory damages (depending upon which side's damages figures are utilized.)

On Feb 15, 2006, petitioner filed a Notice of Appeal to the Sixth Circuit Court of Appeals.

After briefing was completed, but prior to argument, on August 1, 2006, petitioner filed a motion for judicial notice of certain facts in connection with its case. *See Appellant's Motion to take Judicial Notice of certain facts pursuant to Fed. R. Evid. 201,* App. 55a through 97a, and *Appellant's reply to opposition to motion to take Judicial Notice*, App. 102a. Petitioner had asked the court of appeals to notice appellant's corporate affiliation statement, indicating ownership by BMG, a large German conglomeratè that boasted

publicly that it had nearly one third of the world's copyrights, as well as other matters relevant to the issue of allowing them control over the entire karaoke industry by means of a film synch on top of a compulsory mechanical. The court of appeals ignored this policy consideration in its Fair Use analysis, and never ruled on petitioner's motion. The court therefor did not consider the facts proffered, including a recent ruling of the European Union antitrust regulators invalidating a merger of BMG and Sony on anti-competitive grounds, Appellee's 1/3 market share of the world's copyrights, and six similar co-pending suits filed in the same court. (App. 55a, 58a, 61a, 66a, 84a, and 86a.)

After briefing by the parties, on March 5, 2007, oral argument was held. On June 26, 2007, the Sixth circuit issued its opinion affirming both the grant of summary judgment on liability and Fair Use, and the constitutionality of the award.

In analyzing petitioner's Fair Use defense, the court of appeals repeated the errors made by the district court, and also ignored two important policy considerations, that there is a strong public policy behind prevention of a music publisher monopoly embodied in the mechanical compulsory provisions of 17 U.S.C. §115, and that the publishers were in fact already receiving performance fees for public performances of karaoke in bars where Panorama discs might be played legally, because ASCAP or BMI public performance fees are customarily paid by bar owners.

Despite Justice Souter's admonition in *Campbell v. Acuff-Rose* to consider the preamble of 17 U.S.C. §107 ("The enquiry here may be guided by the examples given in the preamble to §107, looking to whether the use is for criticism, or comment, or news reporting, and the like..."), the Sixth Circuit repeated the error which caused this Court to reverse it in *Acuff-Rose* – that is, it gave dispositive weight to the commercial nature of the allegedly infringing work by holding that every commercial use was presumptively unfair, whereas 17 U.S.C. §107 provides that a work's commercial nature is only one element of the inquiry into its purpose and character. In the words of the Sixth Circuit "... Panorama's use is commercial in nature, a fact militating against its fair-use defense." (App. 16a.) Nothing in *Acuff-Rose* supports this approach. Indeed, it prohibits it, as the court stated that commerciality is only one factor, and does not result in any presumptions. 510 U.S. 569, 584 (1994).

While acknowledging that statutory damages might be limited by the Fifth or possibly the Eighth Amendment (App. 24a), instead the precedent set down in *St. Louis, I.M. & S. Ry. v. Williams,* 251 U.S. 63 (1919), which allowed a ratio of 113 to 1 (much higher than the 44:1 in the case at bar) was applied. The court of appeals did not consider the *de minimis* dollar amounts in *St. Louis* ($75), compared to the present case, since it fixated on the ratio. Yet, the Supreme Court has stated that "[W]e have consistently rejected the notion that the constitutional line [between acceptable and unacceptable ratios] is marked by a simple mathematical formula. *BMW, infra*, 517 U.S. at 575-80.

A request for rehearing en banc was filed on July 10, 2007, and denied on October 5, 2007.

REASONS FOR GRANTING THE WRIT

This case is of great importance for numerous reasons.

I. FAIR USE ISSUES

A. Fair Use boundaries remain unexplored since *Campbell v. Acuff-Rose Music.*

The boundaries of Fair Use have only been explored by this Court on a few occasions. Not since this Court reversed the *en banc* Sixth Circuit decision in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), which declared a successful, profane, commercial rap parody of a well known copyrighted song ("Pretty Woman") to be Fair Use, has the concept been defended or protected from erosion by the lower courts, as is their wont.[10] Technology has advanced

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[10] As one commentator, in criticizing the Sixth Circuit opinion under consideration here, observed, "The signal failure of Fair Use decision making is the irresistible tendency of courts to announce and apply hard and fast rules to what is always an ad hoc determination, in the process destroying the very nature and purpose of the doctrine." http://williampatry.blogspot.com/2007/06/karaoke-and-fair-use.html. At the same time, "as citizens, we watch with concern as growing numbers of copyright owners use copyright to suppress opinions or artistic expression which they find distasteful. Although these suits are not uniformly successful, their occasional success leaves a palpable chill upon others interested in similar forms of expression." *Brief of Amici Curie*

tremendously in the ensuing 14 years, but little judicial guidance has taken place from the Court in this regard. In *Campbell v. Acuff-Rose Music*, there was little or no discussion of the examples of Fair Use contained in 17 U.S.C. §107, most notably the word "teaching", except for Justice Souter's observation that Fair Use must be decided on a "case by case basis" and was not comprised of bright line rules. Likewise, Justice Souter's opinion in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), a case involving contributory infringement, avoided Fair Use analysis, instead focusing almost entirely on contributory infringement and the extent of the "*Beta Max* defense" – the protection and deference afforded new technologies by the policies underlying the Copyright Act in *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984). Indeed, the only discussion of Fair Use in the *Beta Max* case was by the dissent.

This Court has consistently held that in deciding copyright Fair Use and various infringement defenses, the lower courts must consider the constitutional purpose of copyright, that is, to encourage creative expression for the public good by promoting "the Progress of Science and useful Arts", U.S. Const. art. I, § 8, cl. 8, and not simply to reward copyright holders. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting that "the ultimate aim is...to stimulate artistic creativity for the general public good".); *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499

Concerned Law Professors in support of Petitioner, pg. 1, in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

U.S. 340 (1991); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 114 S. Ct. 1164, 1170 (1994).

The rights of a copyright holder have historically been limited by various court-made doctrines, most notably Fair Use.[11] Yet, despite its codification at 17 U.S.C. §107, Fair Use remains an amorphous and elusive concept, to be decided on a case by case basis, as a defense to an infringement action. The Sixth Circuit itself admitted that it was a difficult concept to adjudicate. "There are strong reasons to consider this legislative history. The statutory factors are not

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[11] Other limiting doctrines include the originality requirement, *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); the merger doctrine (or idea/expression dichotomy), *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985), and *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068 (9th Cir. 2000), the copyright misuse defense, *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948); *Lasercomb v. Reynolds*, 911 F.2d 970 (4th Cir. 1990); *Video Pipeline, Inc. v. Buena Vista Home Entertainment*, 342 F.3d 191 (3d Cir. 2003); *Assessment Technologies v. WIREdata*, 350 F.3d 640 (7th Cir. 2003), and *Int'l Motor Contest Assoc., Inc. v. Staley*, No. 05-3080 (N.D. Iowa June 19, 2006) and *In re Napster Litigation*, 191 F. Supp. 2d 1087 (N.D. Cal. 2002). The Supreme Court stated, in *Eldred v. Ashcroft, supra*, that First Amendment free speech rights might be implicated by a copyright law revision if that revision "altered the traditional contours of copyright" In *Golan v. Gonzalez* (http://cyberlaw.stanford.edu/system/files/Golan+v.+Gonzales.pdf), the Tenth Circuit remanded to the district court to decide if free speech rights really were implicated. The Government has asked for rehearing. http://cyberlaw.stanford.edu/case/golan-v-gonzales (last visited Dec 23, 2007).

models of clarity, and the Fair Use issue has long been a particularly troublesome one." *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996) (citing *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992) (Nelson, J., dissenting), *rev'd*, *Campbell v. Acuff-Rose*, 510 U.S. 569, 114 S. Ct. 1164 (1994).

As Justice Souter explained in *Acuff-Rose*:

> The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. *Harper & Row*, 471 U.S., at 560; *Sony*, 464 U.S., at 448, and n. 31; House Report, pp. 65-66; Senate Report, p. 62. The text employs the terms "including" and "such as" in the preamble paragraph to indicate the "illustrative and not limitative" function of the examples given, *see Harper & Row, supra*, at 561, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be Fair Uses. 9 Nor may the four statutory factors be treated in isolation, [*CAMPBELL v. ACUFF-ROSE MUSIC, INC.*, ___ U.S. ___ (1994), 8] one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright. *See* Leval 1110-1111; Patry & Perlmutter, Fair Use Misconstrued: Profit, Presumptions, and Parody, 11 Cardozo Arts & Ent.L.J. 667, 685-687 (1993) (hereinafter Patry & Perlmutter).10

Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

Thus, no predictable rules have emerged, while at the same time we are experiencing an onslaught of copyright infringement litigation[12] in recent years.

B. The Sixth Circuit is not following *Acuff-Rose* and is creating a conflict with the Ninth Circuit.

The Sixth Circuit, as opposed to the Ninth Circuit, is still taking the same restricted view of Fair Use as was condemned in *Acuff-Rose,* by placing undue emphasis on the commerciality of a use, ignoring the "end user" in its analysis of the purpose and character of the use, and by ignoring the first principle of copyright, "to promote the Progress of Science and useful Arts". Thus, following its own precedent of

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[12] The most glaring example is the well publicized campaign of RIAA-sponsored copyright litigation against thousands of individual music downloaders, which recently spawned a statutory damage award of $220,000 for downloading 24 songs that had a retail value of less than $24. *Capital Records v. Thomas*, 06cv01497, filed Apr. 19, 2006 (D. Minn.), docket available at http://news.justia.com/cases/featured/minnesota/mndce/0:2006cv01497/82850/ (last visited Dec. 26, 2007). *See also* http://recordingindustryvsthepople.blogsot.com (last visited Dec. 20, 2007), a website that tracks RIAA-instituted copyright litigation. The RIAA is similarly targeting universities, and has set up a "settlement website" to mechanize the process of settling with them. *See* http://www.p2plawsuits.com (last visited Dec 20, 2007). Universities and states attorneys general are starting to enter the fray. *See* "Oregon Challenges RIAA's Tactics in Music Piracy Claim. The state attorney general is resisting the music labels' demand for consumer identities," by Jaikumar Vijayan, Computerworld, Dec. 01, 2007, http://www.pcworld.com/article/id, 140173-c,copyright/article.html (last visited Dec. 20, 2007).

Princeton University Press v. Michigan Document Services, 99 F.3d 1381 (6th Cir. 1996), a case with four dissents, the Sixth Circuit has established a rigid rule that analyzes Fair Use cases in a vacuum, rather than in the context of its effect on individuals and society, as the Ninth Circuit did in *Perfect 10, supra* (societal benefit must be considered), or *Kelly v. ArribaSoft, supra* (most important issue is whether the use competes with the original). If *Panorama* were decided under Ninth Circuit principles, which we believe more accurately reflects the concerns of *Campbell v. Acuff-Rose*, it would have prevailed on its Fair Use defense.

C. Karaoke "teaches" people to sing, and the statute says "teaching" may be Fair Use.

The Sixth Circuit did not properly consider the examples of Fair Use listed in 17 U.S.C. §107, especially "teaching"[13], and did not weigh the results together, in light of the purposes of copyright, all in contravention of *Campbell v. Acuff-Rose Music*.

"When words of a statute are not otherwise defined, it is fundamental that they will be interpreted as taking their ordinary, contemporary, common meaning". *Morse v. Republican Party of Va.*, 517 U.S. 186, 254 (1996). That karaoke "teaches" people to sing is not an extraordinary proposition. The fact that it might also entertain, as the Sixth Circuit stated, does not diminish this obvious statement.

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[13] *See* 17 U.S.C. §107, *supra*.

D. This Court should clarify whether the *"de minimis"* defense is part of Fair Use.

The *"de minimis"* defense, which the court of appeals stated was waived by petitioner, is an element of Fair Use, or is considered part of the Fair Use analysis, at least in the Second Circuit. *See Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 74-75 (2d Cir. 1997) As the Sixth Circuit Court of Appeals stated in *Princeton University*, *supra*, Fair Use is an "unsettled area of law." If the court was to hear the Fair Use defense, it should have heard the *de minimis* defense. In this context, the defense is simple; in light of the compulsory mechanical of 17 U.S.C. §115 allowing mechanical reproductions of performances of musical compositions, the addition of lyrics on screen is a *de minimis* infringement. After all, the musical arrangement is subject to another license already. Finally, the *de minimis* defense was allowed as part of Fair Use analysis in other circuits. *Gordon v. Nextel Commun.*, 345 F.3d 922 (6th Cir. 2003); *Sandoval v. New Line Cinema Corp.*, 137 F.3d 215 (2d Cir. 1998); *Walker Manufacturing, Inc. v. Hoffman*, 261 F. Supp. 2d 1054, 1064-65 (N.D. Iowa 2003).

E. Karaoke industry needs a decision affirming or overruling *Abkco v. Stellar.*

The entire karaoke industry will be affected by a ruling here. There were at least six suits filed along with the instant suit against other karaoke companies in 2003. To petitioner's knowledge, most have not been resolved.

Abkco has been disavowed by at least one other court. On May 21, 2007, the District of Utah held that a film synch licence was not required for karaoke. *EMI Entertainment World, Inc. v. Praddis Music, Inc.*, 2007 U.S. Dist. Lexis 37074. The court held that synchronization licenses are required only where music is played in relation to a moving picture or series of pictures, such as a movie, television show, or music video. Scrolling words that changed color on the screen in time with the music were not "pictures" that required such a license. EMI has indicated that it will appeal the ruling. http://www.gordonrees.com/news/inCourt_072407b.cfm (last visited Dec. 23, 2007).

On the other hand, the Second Circuit follows the *Abkco* rule requiring a film synch. Another case, *Leadsinger, Inc. v. BMG Music Publishing*, 429 F. Supp. 2d 1190 (on appeal as No. 06-55102 9th Cir., 2007), followed *Abkco* and the Sixth Circuit decision herein and held that a film synch license was in fact needed because a CD+G disc is an audio visual work. That case was argued on October 17, 2007, and is awaiting decision. *See* http://www.brownrudnick.com/nr/pdf/press/Lead_Singer_Karaoke_Copyright_1106.pdf (last visited Dec. 21, 2007) for a description of the case.

Either way, the issue transcends the parties here, and is not likely going away.

II. STATUTORY DAMAGE ISSUES

A. This Court should clarify whether statutory damages should be limited by Fifth Amendment Due Process.

The Sixth Circuit refused to apply leading Fifth Amendment[14] Due Process cases, namely *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America v. Gore*, 517 U.S. 559 (1996), and *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), on the grounds that they are not statutory damage cases, but yet reaches back to *St. Louis, I.M. & S. Ry. v. Williams,* 251 U.S. 63 (1919), a statutory damage award case involving $75.00, to sustain an $806,000 copyright award. Despite the clear trend of authority in other circuits, which it cited in its opinion (App. 24a), the Sixth Circuit stated, "Until the Supreme Court applies *Campbell* to an award of statutory damages, we conclude that *Williams* controls, not *Campbell*, and accordingly reject Panorama's due process argument." (App. 26a.)

Courts have recognized statutory damages to be essentially punitive in nature. *On Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001). "Statutory damages for copyright infringement are not only 'restitution of profit and reparation for injury,' but are also in the nature of a penalty, 'designed to discourage wrongful conduct.'" *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996) (quoting *F.W. Woolsworth Co. v. Contemporary Arts, Inc.*, 344 U.S.

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[14] *See* U.S. Const. amend. V, *supra*.

228 (1952)). The legislative history of the Copyright Act specifically states that "statutory damages are intended (1) to assure adequate compensation to the copyright owner for his injury, and (2) to deter infringement." *See* Staff of House Comm. on the Judiciary, 87th Cong., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 103 (Comm. Print 1961), *reprinted in* 3 Omnibus Copyright Revision Legislative History (George S. Grossman ed., 1976), Tex. L. Rev. 525, 548-49 (2004).

The Second Circuit has recognized the general danger of multiplied statutory damages as well. In a 2003 decision, the court noted that aggregating large numbers of statutory damages risks distorting the purpose of statutory damages, instead "creat[ing] a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements." *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 22 (2d Cir. 2003). The court went on to note that these multipliers risk running afoul of constitutional due process. *Parker*, 331 F.3d at 22. *See also Fitzgerald Pub. Co. v. Baylor Pub. Co.*, 670 F. Supp. 1133, 1140 (E.D.N.Y. 1987) ("[Copyright statutory] damages should bear some relation to the actual damages suffered").

The issue is ripe for clarification. As the U.S. Department of Justice, intervenor, quoting the Sixth Circuit *Panorama* opinion, stated in *Capitol Records v. Thomas*, 06cv1497 (D. Minn. 2006), docket available at http://news.justia.com/cases/featured/minnesota/mndce/0:2006cv01497/82850/:

> The Supreme Court has not indicated whether *Gore* and *Campbell* apply to awards of statutory damages. We know of no case invalidating such an award of statutory damages under *Gore* or *Campbell*, although we note that some courts have suggested in dicta that these precedents may apply to statutory-damage awards. *See, e.g., Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (suggesting that "in a sufficiently serious case," due process may require courts to reduce a statutory-damage award in a class action, and citing both *Campbell* and *Gore*); *Leiber v. Bertelsmann AG* (*In re Napster, Inc. Copyright Litig.*), Nos. C MDL-00-1369 MHP & C 04-1671 MHP, 2005 WL 1287611, at *10 (N.D. Cal. June 1, 2005) (unpublished) (citing *Gore* and *Campbell*); *DIRECTV v. Gonzalez*, No. Civ.A.SA-03-1170 SR, 2004 WL 1875046, at * 4 (W.D. Tex. Aug. 23, 2004) (unpublished) (citing *Campbell*); *but see Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 459-60 (D. Md. 2004) (concluding that *Gore* and *Campbell* do not limit statutory damages in copyright cases).

The district court, relying on *Johnson v. Jones*, 149 F.3d 494, 504 (6th Cir. 1998), distinguishing a Second Circuit case, *Nat'l Football League v. Primetime 24 Joint venture*, 131 F. Supp. 2d. 458 (S.D.N.Y. 2001), clearly stated that there is a "partially punitive character" of statutory damages and cited deterrence as a basis for assessing such high damages. (App. 42a.)

The Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a

tortfeasor. *See State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) and *BMW of North America v. Gore*, 517 U.S. 559 (1996). It should not matter what name it is called – statutory or punitive damages, the effect on the tortfeasor is the same – financial devastation, usually far in excess of the economic value of the case (apart from the statutory damages and attorney's fees).

The Sixth Circuit refused to apply both *BMW* and *Acuff-Rose* (as well as *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007)), any of which would have mandated a finding of unconstitutional denial of Due Process based upon the disproportionate ratio of actual to punitive damages (generally, "single digits" is the limit on multipliers), and instead applied the precedent set down in *St. Louis, I.M. & S. Ry. v. Williams,* 251 U.S. 63 (1919), which allowed a ratio of 113 to 1 (much higher than the 44:1 in the case at bar). However, the court of appeals should not have looked for a comfortable formula. "[W]e have consistently rejected the notion that the constitutional line [between acceptable and unacceptable ratios] is marked by a simple mathematical formula. *BMW, supra*, 517 U.S. at 575-80.

In *Philip Morris, supra*, the Supreme Court recently considered "whether the Constitution's Due Process Clause permits a jury to base [a punitive-damage] award in part upon its desire to punish the defendant for harming persons who are not before the court." *Id.* at 1060. The Sixth Circuit considered *Philip Morris* to be inapposite because the district court did not base its award of statutory damages on Panorama's conduct concerning "copyright holders

other than Zomba." However, to the extent that the district court had cited *deterrence* as a basis for assessing such high damages, the award was at least partially on account of "strangers to the litigation", prohibited within the meaning of *Philip Morris USA v. Williams*.

B. The Court should clarify whether the Eighth Amendment Excessive Fines Clause applies to statutory damages.

Despite the trend of authority, the Sixth Circuit refused to apply the Eighth Amendment Excessive Fines Clause[15] to this case, on the ground that it was not a criminal case, despite the clause having been extended to civil forfeitures in *Austin v. United States*, 509 U.S. 602 (1993), and this Court leaving open the issue of civil penalties and qui tam actions in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). Nevertheless, the Sixth Circuit opinion at issue here is being cited in other cases by the government for the proposition that statutory damages are immune from constitutional attack. See discussion of *Capital Records v. Thomas, supra*.

At the same time, Judiciary Chairman John Conyers this very month introduced H.R. 4279, which would increase fines for intellectual property violations, and create several new government positions with the power to enforce the new law criminally. *See* "Lawmakers raise questions about copyright enforcement bill," http://www.macworld.com/

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[15] *See* U.S. Const. amend. VIII, *supra*.

article/131068/2007/12/lawmakers.html (last visited Dec 21, 2007).

Inasmuch as most copyright infringements for commercial purposes are already the subject of criminal penalties, including incarceration, *see* 17 U.S.C. §506, and 18 U.S.C. §2319, this Court should be concerned that Fair Use is clearly explicated, defended and preserved, if not expanded. The combination of statutory damages, criminal penalties, attorneys fee shifts and the specter of government intrusion makes the exercise of Fair Use a perilous exercise these days.

In *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), this Court left open whether the Excessive Fines Clause, which was heretofore limited to criminal cases, has any applicability to civil penalties or to qui tam actions, and more recently, in *Austin v. United States*, 509 U.S. 602 (1993), the Court noted that the application of the Excessive Fines Clause to civil forfeiture did not depend on whether it was a civil or criminal procedure, but rather on whether the forfeiture could be seen as punishment. The Court was apparently willing to consider any number of factors in making this evaluation; civil forfeiture was found to be at least partially intended as punishment, and thus limited by the clause, based on its common law roots, its focus on culpability, and various indications in the legislative histories of its more recent incarnations.

The Eighth Amendment "clearly was adopted with the particular intent of placing limits on the powers of the new government." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). This fear of a

government sponsored monopoly on publication and the repression of free speech was why the framers, in the enumerated powers of U.S. Const. art. I, placed limitations upon that power, such as the grant for "limited times" and "to promote the progress of science and the arts." *Eldred v. Ashcroft, supra; see also Eldred v. Reno*, 239 F.3d 372 (D.D.C. 2001). The holder of a copyright has a government granted monopoly with severe enforcement powers, and the history of copyright clearly indicates a distrust of copyright monopolies going back to England and the Statute of Anne. *See Wheaton v. Peters,* 33 U.S. 591, 598 (1834). *See also* "State of the Arts: Protecting Publishers or Promoting Progress?," Rich. J.L. & Tech., vol. XII issue 2 (2005).

Now as a result of recent sweeping amendments to the Copyright Act sought by large international publishing and music cartels, statutory damages, which are expressly not in relation to any actual damages suffered, are now between $750 and $150,000 per infringement. Whether they be deemed "statutory damages" or punitive damages or simply a "fine" (as the U.S. D.O.J. brief called it), these amounts are completely indiscriminate. The awards go to the holder of a government issued copyright in a federal court, in lieu of the sovereign. The oppressive hand of government is all over the transaction. It is not just a case of denial of Due Process between private litigants in state court like *BMW of North America, Inc. v. Gore, supra,* 517 U.S. at 559 – it is simply an unconstitutionally excessive fine levied in a federal court to a government granted monopolist, who otherwise would have no such excessive power over the appellant. Petitioners asked the court of appeals to

apply the *Browning* and *Austin* cases in the instant case, but it did not.

C. Copyright holders are flooding the courts with statutory damage cases.

This case illustrates an alarming trend – large disproportionate civil statutory damage awards in copyright cases. Professional copyright trade organizations and lobbying organizations like the RIAA (Recording Industry Association of America), NMPA (National Music Publishers Association), and MPAA (Motion Picture Association of America), along with foreign or multinational trade organizations, like the International Federation of the Phonographic Industry (IFPI) , and the World Intellectual Property Organization (WIPO), have engineered increases in statutory damage limits all over the world, including 17 U.S.C. §504, and have at the same time, mounted well financed and highly publicized campaigns against both professional and consumer infringers.

One example of this was the well publicized case of *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000), in which the RIAA[16], on

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[16] The RIAA was one of the parties seeking certiorari in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Its name, "The Recording Industry Association of America", is somewhat of a misnomer, as it is largely comprised and financed by large non-U.S. owned music recording companies, such as, Sony/BMG, Universal, and EMI, after most of the U.S. recording industry was bought up by foreign interests in the 1980's and 1990's. Nevertheless, the Librarian of Congress, after a hearing before a copyright arbitration royalty panel ("CARP"), gave the RIAA the

behalf of the five major recording labels, brought suit against website MP3.com and sought in excess of $250,000,000 in statutory damages. In granting partial summary judgment in favor of the RIAA, the judge observed that internet companies "may have a misconception that, because their technology is somewhat novel, they are somehow immune from the ordinary applications of laws of the United States, including copyright law," but that "[t]hey need to understand that the law's domain knows no such limits." *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000). *See also* http://archives.cnn.com/2000/LAW/09/06/mp3.lawsuit.01/.

Another example was the well publicized campaign of RIAA-sponsored copyright litigation against thousands of individual music downloaders, which recently spawned a statutory damage award of $220,000 for downloading 24 songs that had a retail value of less than $24. *Capital Records v. Thomas*, *supra*. *See also* http://recordingindustryvsthepople.blogsot.com, a website that tracks RIAA instituted litigation. Of note is the admission made by the RIAA in *Capitol Records v. Thomas* that most of the proceeds of these litigations are earmarked to file more litigations by the RIAA on behalf of its members.

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responsibility for collecting and distributing the royalty fees to all copyright owners. *See* 63 FR 25394, 25397 (May 8, 1998) under the 1996 webcasting amendments to the Copyright Act, 17 U.S.C. §114(d). In November 2000, RIAA formed "SoundExchange," an unincorporated division of RIAA, to administer statutory licenses, including its responsibilities under the Librarian's May 8 order.

D. U.S. Department of Justice cites case at bar in intervenor and amicus filings.

The opinion under consideration here is now being cited as precedent, despite what petitioner believes are grievous errors. The U.S. Department of Justice, in its intervenor's brief in *Capital Records v. Thomas*, *supra*, defended the constitutionality of the award in that case by relying heavily on the Sixth Circuit's decision in the case at bar, *Zomba v. Panorama*. The U.S. did concede, however, that "The Sixth Circuit did mention that *Gore* and *Campbell* "may apply to statutory-damages awards", and actually referred to them, in a Freudian slip, as *"fines"*. http://www.ilrweb.com/viewILRPDF.asp?filename=virgin_thomas_071203USBrief (last visited Dec. 23, 2007).

E. This Court should clarify that a finding of willfulness does not require damages of at least $30,000.00 per infringement, but $750.00.

This Court should clarify that a finding of willfulness in a copyright case does not require statutory damages of at least $30,000 per infringement, but 750.00 per infringement. Other circuits have awarded far less than that for willful infringements. *Nat'l Football League v. Primetime 24 Joint venture*,131 F. Supp. 2d. 458 (S.D.N.Y. 2001); *Morganactive Songs v. K&M Fox, Inc.*, 77 U.S.P.Q.2d. 1064, 1070 (S.D. Ind. 2005); *Jobete Music, Inc. v. Johnson Communications, Inc.*, 285 F. Supp. 2d 1077 (S.D. Ohio 2003); *Arclightz & Films v. Video Palace*, 303 F. Supp. 2d 356 (S.D.N.Y 2003).

Finally, the court of appeals repeated the mistake made by the district court when it stated that $30,000 was the limit for "innocent infringement", thus implying that any willful conduct must be punished in an amount in excess of $30,000, when the statute, 17 U.S.C. §504, makes no such distinction. As a result, it appears that petitioner could have been assessed damages as low as $750.00 per infringement, and still be considered "willful". Nowhere is it explained why the $30,000 per infringement maximum for all infringements, willful or not, is insufficient and must require a kind of "upward departure", except for "judicial discretion".

III. Judicial Notice

Appellate decisions on Fair Use often concern summary judgment before trial, and should not be decided in a factual vacuum. Fed. R. Evid. 201(f) expressly provides that judicial notice may be taken at any stage of the proceeding. Petitioner had filed a motion pursuant to Rule 201(f), which was ignored. (App. 62a, 109a.) The Sixth Circuit should have considered that the merger of Zomba's parent BMG, which had merged with Sony to form Sony-BMG in 2004 and had a large market share, was voided by the European Union as being anti-competitive and against the consumer's best interest, since Fair Use, at least according to Supreme Court precedent such as *Beta Max, Eldred, Acuff-Rose* and others, must be decided in light of the purpose of copyright, that is, promoting the progress of science and the useful arts, and advancing society generally. Petitioner's motion and reply papers cited dozens of cases of appellate court decisions, including the Sixth Circuit, where facts were

noticed, App. 112a-114a. Nothing in Fed. R. App. P. 10 respecting the record on appeal contradicts this.

CONCLUSION

For the foregoing reasons, petitioner submits that this Court should grant review in this case to reverse the holding of the Sixth Circuit with respect to its Fair Use analysis and the constitutionality of statutory damage awards, and remand the case for a redetermination of these issues consistent with opinions of this Court, lest copyright holders control or eliminate karaoke for some or all of their songs, and inflict substantial punishment upon those that enable karaoke.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 06-5013, 06-5266

[Filed June 26, 2007]

ZOMBA ENTERPRISES, INC.; Zomba Songs, Inc., Plaintiffs-Appellees,	)
v.	)
PANORAMA RECORDS, INC., Defendant-Appellant.	)

Before: BATCHELDER and MOORE, Circuit Judges; MILLS, District Judge.*

OPINION

KAREN NELSON MOORE, Circuit Judge. From Japan to the United States and beyond, karaoke is wildly popular. Countless people have lined up at various venues to perform their favorite songs with,

* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

and in front of, their friends. But few participants (with the possible exception of IP lawyers) ever stop to consider the intellectual property regime governing karaoke.

Panorama Records, Inc. ("Panorama"), a purveyor of karaoke discs, resembles the majority of these participants. It entered the business of recording and selling karaoke discs without considering whether doing so infringed the intellectual property rights of others. Before long, this lack of foresight caught up with Panorama.

This case requires us to review a district court's entry of summary judgment in favor of, and monetary award to, a plaintiff copyright holder whose musical compositions Panorama copied on its karaoke discs. Ultimately, we conclude that the district court (1) correctly concluded that Panorama willfully infringed the plaintiffs' copyrights, and did not abuse its discretion by (2) awarding the plaintiffs $806,000 in statutory damages, (3) denying Panorama's motion to transfer venue, and (4) awarding the plaintiffs attorney fees. Accordingly, we **AFFIRM** the district court's judgment in all respects.

I. FACTS AND PROCEDURE

A. Statutory Background

Our Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to their respective Writings." U.S. CONST. art. I, § 8, cl. 8. Toward that end, the Copyright Act offers

protection to various kinds of works of authorship, including "musical works, including any accompanying words." 17 U.S.C. § 102(a)(2).[1] This protection provides copyright owners with the exclusive rights to reproduce the works and to distribute these copies to the public. *Id.* § 106(1), (3). Anyone who violates these, or other, rights of the copyright owner is an "infringer," and thus is liable to the owner, *id.* § 501(a), (b), and subject to injunctions, *id.* § 502, damages, *id.* § 504, and attorney fees, *id.* § 505.

Plaintiff copyright owners whose copyrights actually have been infringed may elect between receiving as damages (1) their actual damages plus the infringer's profits attributable to its infringement, or (2) statutory damages. *Id.* § 504(b), (c). In the standard copyright-infringement case, the district court has discretion to award statutory damages of any amount between $750 and $30,000 for each copyright infringed. *Id.* § 504(c)(1). However, if the plaintiff proves that the infringement is willful, the statutory-damage ceiling rises to $150,000. *Id.* § 504(c)(2). Conversely, if the defendant establishes that infringement is innocent, the statutory-damage floor falls to $200. *Id.*

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[1] A song's lyrics are also entitled to independent protection as "literary works." *See* 17 U.S.C. § 102(a)(1) (providing for copyright of literary works); *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 64 (2d Cir. 1996) (noting that "lyrics enjoy independent copyright protection as 'literary works'").

B. Factual Background

Since 1998, Panorama has been in the business of manufacturing and selling karaoke compact discs. It issues a new disc monthly in each of a variety of musical genres, including country, pop, rock, and R & B. Each installment (or "karaoke package") contains the top hits in that genre for the relevant month. Laurindo Santos is one of Panorama's four shareholders, and at all times relevant to this case he was the decision-maker regarding the release of products.

The individual discs that Panorama makes and sells are in the CD+G format-shorthand for "compact disc plus graphics." As Panorama explains, "[t]hese are compact discs on which musicians that are hired by Panorama record a musical composition of a work which at some time may have been made popular by another artist. The CD+G contains a graphic element and is designed to be viewed when played on a karaoke machine." Joint Appendix ("J.A.") at 472 (Resp. to Req. for Admis. # 1). The graphic element consists of the text of each song's lyrics, and it scrolls across a screen as the music (sans vocals) plays, permitting karaoke participants to read the lyrics as they sing along. Each of Panorama's karaoke packages contained nine or ten songs, with two tracks for each song, one track released with audible lyrics and one without.

Zomba Enterprises, Inc. and Zomba Songs, Inc. (collectively, "Zomba") are music publishing corporations often identified by the trade name Zomba Music Publishing. Zomba "is in the business of exploiting musical compositions for commercial gain."

J.A. at 257 (Kalinska Aff. ¶ 2). Toward this purpose, and at all times relevant to this case, Zomba held and administered the copyrights to a variety of musical compositions, including songs performed by pop music performers such as 98 Degrees, Backstreet Boys, *NSYNC, and Britney Spears.[2]

Without Anna Music ("Without Anna") is another music publishing company, but is not a party to this action. In 2000, Without Anna discovered that some of the songs to which it owned copyrights appeared on Panorama's karaoke packages. In response, attorney Linda Edell Howard sent a cease-and-desist letter to Panorama on Without Anna's behalf, demanding that Panorama quit selling unlicensed copies of Without Anna's songs. When Panorama received this letter from Howard in 2000, it had not acquired licenses from the copyright owners of any of the songs it had released in its karaoke packages. Panorama then hired Vincent Castalucci, a licensing agent, and began negotiating licenses. Eventually, Panorama obtained license agreements from Without Anna.

On February 28, 2002, Howard sent another cease-and-desist letter to Panorama, this time on behalf of Zomba. Like Without Anna, Zomba had discovered that Panorama's karaoke packages contained copies of songs it owned. Zomba's cease-and-desist letter specified the terms upon which Zomba would be willing to grant a license: a $250

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[2] The record does not indicate whether Zomba also holds copyrights to the sound recordings of these songs, but this is irrelevant to the litigation.

fixing fee for each Zomba-owned song on each package,[3] plus royalties of $0.16 per song per CD+G sold for the first half of the five-year license term, and $0.19 per song per CD+G sold for the second-half of the term. Santos and Castalucci contacted Howard in response to this letter, but Panorama did not stop selling CD+Gs with Zomba's songs on them, nor did it obtain any licenses.

On April 12, 2002, Howard sent a follow-up cease-and-desist letter on Zomba's behalf. Again, Santos and Castalucci responded to the letter. And again, Panorama failed both to obtain licenses to Zomba's songs and to cease selling CD+Gs containing them.

C. Procedural History

On January 13, 2003, Zomba filed its complaint, asserting thirty counts of copyright infringement–one count for each Zomba-owned musical composition that Panorama recorded and sold in its karaoke packages. Panorama answered, asserting no affirmative defenses other than estoppel, laches, waiver, and acquiescence. On April 22, 2003, the parties entered into a consent order in which Panorama agreed "to be restrained from distributing, releasing or otherwise exploiting any karaoke package containing compositions owned

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[3] Howard testified that a "fixing fee" "is basically a permission to fix the copyrighted musical work with the technology to allow you to visually see the lyric[s]. And it is a one-time fee...." J.A. at 650 (11/5/05 Hr'g Tr. at 18). Such permission generally comes in the form of a "synch license." *ABKCO Music*, 96 F.3d at 62-63 & n. 4.

or administered by" Zomba. J.A. at 202 (4/22/03 Dist. Ct. Order). Within a week of entering this consent order, Panorama breached its agreement and resumed selling CD+Gs containing Zomba's copyrighted work. This conduct continued, and a year later, Zomba moved for sanctions on this basis.

After the parties filed cross-motions for summary judgment but before the district court ruled, Panorama's counsel withdrew on May 10, 2004. On June 18, 2004, the district court granted Zomba's, and denied Panorama's, motion for summary judgment on the issue of copyright infringement, rejecting Panorama's fair-use defense.

To determine damages, the district court scheduled a bench trial for August 10, 2004. Panorama was unable to obtain new counsel and consequently failed to file any of the required pretrial documents or to appear at the pretrial conference held on July 29, 2004. The district court accordingly entered a default against Panorama on the issue of damages. Panorama responded by filing for bankruptcy in the Bankruptcy Court for the District of Massachusetts on August 9, 2004. In response, the district court stayed the case.

After the bankruptcy court lifted its stay, Panorama moved the district court to transfer the case to either the bankruptcy court, the U.S. District Court for the District of Massachusetts, or the U.S. District Court for the Southern District of New York. The district court denied this motion on August 9, 2005. On November 5, 2005, the district court held a hearing to determine the amount of damages. A month later, the district court issued findings of fact and conclusions of

law. The district court concluded that Panorama's infringement was willful, and accordingly awarded Zomba $31,000 for each of the twenty-six infringements at issue,[4] for a total of $806,000. On January 23, 2006, the district court also awarded Zomba $76,456.16 in attorney fees and $1058.91 in costs. Panorama timely filed notices of appeal on December 29, 2005, and February 15, 2006.[5]

II. JURISDICTION

The district court had federal-question jurisdiction over this copyright case, 28 U.S.C. § 1331, and 28 U.S.C. § 1291 gives us jurisdiction over the district court's final judgment.

III. ANALYSIS

On appeal, Panorama raises a series of challenges. First, it objects to the district court's rejection of its fair-use defense and the district court's correlative conclusion that Panorama infringed Zomba's

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[4] Zomba previously had voluntarily dismissed four of the thirty counts in its complaint. For clarity, the remaining twenty-six musical compositions are referred to as the "relevant compositions."

[5] The former notice of appeal seeks review of (1) the district court's granting original counsel permission to withdraw; (2) the grant of summary judgment in favor of Zomba; (3) the default judgment on damages; (4) the denial of the motion to change venue; and (5) the December 5, 2005 order awarding statutory damages. The latter notice of appeal seeks review of the district court's award of attorney fees and costs.

copyrights. Next, it disputes the district court's statutory-damage calculation, arguing both that any infringement was not willful and that the $806,000 damage award is unconstitutionally high. Third, it argues that the district court erred by refusing to grant its motion to transfer venue. Finally, Panorama appeals the district court's award of attorney fees to Zomba.

A. Copyright Infringement

1. Standard of Review

The district court granted Zomba's motion for summary judgment on the issue of copyright infringement. We review de novo a district court's order granting summary judgment, *DiCarlo v. Potter,* 358 F.3d 408, 414 (6th Cir. 2004), and will affirm a grant of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c). In reviewing the district court's decision to grant summary judgment, we view all evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

2. Elements

The elements of a copyright-infringement claim are (1) ownership of the copyright by the plaintiff and (2) copying by the defendant. *ATC Dist. Group, Inc. v.*

Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 705 (6th Cir. 2005); *Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir. 1999). Panorama disputes neither element. Instead, it claims that the fair-use doctrine affirmative defense precludes liability.[6]

3. Fair Use

Panorama's core argument is that its copying should be considered "fair use" under the Copyright Act. Although Panorama did not raise fair use as an affirmative defense in its answer, it offered this argument to the district court in support of its, and in opposition to Zomba's, motion for summary judgment. Because Panorama presented the issue of fair use to the district court and because the district court addressed it, we assume without deciding that it was not waived.

The purpose of the fair-use doctrine is to ensure that courts "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."

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[6] In addition to fair use, Panorama asserts on appeal a number of other affirmative defenses. Specifically, Panorama argues that Zomba's copyrights violate "the idea/expression dichotomy," are subject to compulsory licensing, and constitute copyright misuse. It also maintains that its use of Zomba's musical compositions was *de minimis*, and accordingly not actionable. We do not consider these arguments because Panorama failed to present any of these defenses to the district court and accordingly forfeited them. *Armstrong v. City of Melvindale*, 432 F.3d 695, 700 (6th Cir. 2006) ("[T]he failure to present an issue to the district court forfeits the right to have the argument addressed on appeal.").

Princeton Univ. Press v. Mich. Doc. Servs., Inc., 99 F.3d 1381, 1385 (6th Cir. 1996) (en banc), *cert. denied*, 520 U.S. 1156, 117 S.Ct. 1336, 137 L.Ed.2d 495 (1997). Accordingly, § 107 of the Copyright Act provides that "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107. It further instructs district courts to consider the following factors in analyzing a claim of fair use:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2. the nature of the copyrighted work;

3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4. the effect of the use upon the potential market for or value of the copyrighted work.

Id. Because, as explained below, none of these factors supports Panorama's position, we reject Panorama's fair-use defense.

a. Purpose and Character of Use

In evaluating the purpose and character of the use of the work at issue, we consider whether the new

work is "transformative," and whether the use of that work is for commercial or noncommercial purposes.

> The central purpose of this investigation [into purpose and character of use] is to see ... whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994). "[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id.*

As an initial matter, Panorama's use of the compositions is only minimally, if at all, transformative. Although Panorama created its own recordings of these songs, Santos admitted that the hired musicians did not "change the words or music." J.A. at 684 (11/5/05 Hr'g Tr. at 52). Unlike a parody, *see Campbell,* 510 U.S. at 579-80, 114 S.Ct. 1164, a facsimile recording of a copyrighted composition adds nothing new to the original and accordingly has virtually no transformative value. *Cf. Princeton Univ. Press,* 99 F.3d at 1389 ("If you make verbatim copies of 95 pages of a 316-page book, you have not transformed the 95 pages very much.... This kind of mechanical 'transformation' bears little resemblance to the creative metamorphosis accomplished by the parodists in the *Campbell* case.").

The crux of Panorama's fair-use argument is its assertion that its use was transformative because its karaoke packages are used for "teaching." Notably, this focus is newly found. In the district court, Panorama's primary argument was that their karaoke packages "encourage creativity, and often commentary" among their end-users, and accordingly qualify as "transformative works." J.A. at 218-19 (Mem. in Supp. of Def.'s Mot. for Summ. J. at 13-14). Although Panorama offered a passing reference to karaoke's value as "an interactive and educational experience," J.A. at 218 (Mem. in Supp. of Def.'s Mot. for Summ. J. at 13), it never argued that the primary purpose of karaoke is "teaching," and for good reason, as this argument is wholly meritless. Panorama's own description of karaoke further undermines its assertion regarding "teaching": "Karaoke is primarily thought of as a form of *entertainment* that allows anyone to grab a microphone, hop on stage, and live out their [sic] fantasies of performing as famous music stars." J.A. at 208 (Mem. in Supp. of Def.'s Mot. for Summ. J. at 3) (emphasis added). Moreover, the record is bereft of evidence indicating that Panorama's products are used for teaching *at all* (e.g., invoices showing sales to schools, advertisements aimed at educators, affidavits from teachers, etc.).

More importantly though, the end-user's utilization of the product is largely irrelevant; instead, the focus is on whether alleged infringer's use is transformative and/or commercial. In *Princeton University Press,* we considered a copyright suit against a college-town copy shop that copied portions of books and then sold these copies to students in "coursepacks." 99 F.3d at 1383. We rejected the copy shop's fair-use defense,

concluding that the defendant's copying was a commercial use, even though the students ultimately used the copies for educational purposes. *Id.* at 1389. To reach this conclusion, we emphasized that "the use of the materials by the students is not the use that the publishers are challenging." *Id.* at 1386. Instead, the publishers were challenging "the duplication of copyrighted materials for sale by a for-profit corporation that has decided to maximize its profits ... by declining to pay the royalties requested by the holders of the copyrights." *Id.*

Quite similarly, Zomba does not challenge karaoke crooners' renditions (atrocious or otherwise) of the relevant compositions, but rather Panorama's decision to copy these songs onto CD+Gs and then distribute them without paying royalties. Like the copying at issue in *Princeton University Press,* Panorama's manufacturing and selling the karaoke packages at issue "was performed on a profit-making basis by a commercial enterprise." *Id.* at 1389. Accordingly, Panorama's use is commercial in nature, a fact militating against its fair-use defense.

b. The Nature of the Copyrighted Work

The second of the § 107 factors "calls for recognition that some works are closer to the core of intended copyright protection than others," *Campbell,* 510 U.S. at 586, 114 S.Ct. 1164, and accordingly are entitled to stronger protection. Like the musical composition in *Campbell* (Roy Orbison's "Oh, Pretty Woman"), the compositions of pop songs here at issue "fall[ ] within the core of the copyright's protective purposes." *Id.*

Accordingly, this factor militates against a finding of fair use.

c. The Amount and Substantiality of the Portion Used

As the *Princeton University Press* court recognized, "the larger the volume ... of what is taken, the greater the affront to the interests of the copyright owner, and the less likely that a taking will qualify as a fair use." *Princeton Univ. Press,* 99 F.3d at 1389 (quoting Pierre N. Leval, *Toward a Fair Use Standard,* 103 HARV. L.REV. 1105, 1122 (1990)). Here, Panorama acknowledges that it copied the entire compositions. It hired studio musicians to play the songs as closely as possible to the original performers, and distributed copies of their efforts. Additionally, it copied the lyrics, in both an auditory (on the tracks containing vocals) and a visual (on the graphics display) fashion. Because Panorama copied the relevant compositions in their entirety, this factor, too, cuts against Panorama's fair-use defense.

d. Effect on the Potential Market for the Copyrighted Work

Finally, we consider the effect on the potential market for licensing of the relevant musical compositions. Regarding the allocation of proof for this factor, we have held that when the copying at issue is commercial in nature, the alleged infringer bears the burden of proving the "market effect" factor. *Princeton Univ. Press,* 99 F.3d at 1385-86. Here, Panorama has failed to sustain its burden of proving that its copying

does not adversely affect the market value of Zomba's copyrights.

The thrust of Panorama's argument–that Zomba and Panorama operate in different markets–is factually inaccurate, as the record illustrates that Zomba has previously licensed (and continues to license) its musical compositions to purveyors of karaoke products. It follows, then, that market harm is a given, as Panorama's unlicensed copying deprived Zomba of licensing revenues it otherwise would have received.[7] Further, there can be no doubt that Panorama's practices, if they became widespread throughout the karaoke industry, would have a deleterious effect on the potential market for licenses to Zomba's songs. Accordingly, Panorama cannot show that its copying passes the market-harm test,[8] and this factor, like the other three, militates in favor of rejecting its fair-use defense.

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[7] Panorama attacks this analysis as circular, Reply Br. at 7, but fails to acknowledge that we have previously rejected the identical circularity argument in an en banc case. *See Princeton Univ. Press*, 99 F.3d at 1387-88.

[8] Panorama further argues that its use of Zomba's musical compositions is likely to enhance, rather than harm, the market demand for Zomba's products. While this argument might make sense if the copyrights at issue were copyrights of sound recordings, that is not the case, and Panorama offers no evidence that unlicensed copying of Zomba's musical compositions spurs demand for additional licensing, or even any logical reason why it could.

Because all four fair-use factors indicate that Panorama's copying was not a fair use, we conclude that the district court correctly rejected this defense and concluded that Panorama infringed Zomba's copyrights.

B. Willfulness

Next, Panorama argues that even if it infringed Zomba's copyrights, the district court erred by concluding that the infringement was willful and thus was subject to enhanced statutory damages. According to Panorama, any infringement was innocent, and certainly not willful. We disagree.

For infringement to be "willful," it must be done "with knowledge that [one's] conduct constitutes copyright infringement." *Princeton Univ. Press,* 99 F.3d at 1392 (quoting MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 14.04[B][3] (1996)). Accordingly, "one who has been notified that his conduct constitutes copyright infringement, but who reasonably and in good faith believes the contrary, is not 'willful' for these purposes." *Id.* This belief must be both (1) reasonable *and* (2) held in good faith. *See id.*

Panorama argues that it held a good-faith belief that the copying here at issue was a fair use, and contends that even if ultimately erroneous, this belief precludes a finding of willfulness. As in *Princeton University Press,* the issue is not so much whether Panorama held in good faith its belief that its copying was fair use (although we have serious misgivings on

this matter),[9] but whether Panorama *reasonably* believed that its conduct did not amount to copyright infringement. *Princeton Univ. Press*, 99 F.3d at 1392. To decide this issue, we must determine "whether the copyright law supported the plaintiffs' position so clearly that the defendants must be deemed as a matter of law to have exhibited a reckless disregard of the plaintiffs' property rights." *Id.* We review de novo this narrow issue, *id.*, but we note that other circuits have reviewed for clear error district courts' conclusions on the broader issue of willfulness, *see, e.g., Kepner-Tregoe, Inc. v. Vroom,* 186 F.3d 283, 288 (2d Cir. 1999); *Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1227 (7th Cir. 1991) (citing *Int'l Korwin Corp. v. Kowalczyk,* 855 F.2d 375, 380 (7th Cir. 1988)). Because our analysis focuses solely on the narrower issue, we need not determine whether *Princeton University Press*'s de novo standard applies to the broader issue of willfulness in general. Accordingly, we

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[9] The reasons for these misgivings are numerous. For instance, we note that Panorama did not mention fair use in its initial licensing discussions with Howard. Instead, Panorama waited to raise its fair-use defense until this litigation was over a year old. This delay calls into serious question whether Panorama sincerely believed that its copying was a fair use before it began recording and distributing the karaoke packages. Instead, it appears that the fair-use defense was merely a post-hoc rationalization concocted to skirt liability. Further, we note that the record is bereft of evidence that Panorama ever discussed the fair-use doctrine with an attorney. This fact distinguishes Panorama's situation from that of the defendant in *Princeton University Press,* who had consulted with an attorney regarding fair use. *See Princeton Univ. Press,* 99 F.3d at 1384.

express no opinion on that issue, leaving it for a future case.

Here, we conclude that Panorama exhibited a reckless disregard for Zomba's rights, and accordingly, that Panorama's reliance on its fair-use defense was objectively unreasonable. The fact most crucial to this inquiry is that Panorama continued to sell karaoke packages containing copies of each of the relevant compositions *after* the district court entered its April 22, 2003, consent order forbidding Panorama to do so.

In copyright cases, it is unreasonable to rely on a defense to infringement after a court rejects it on the merits. *Kepner-Tregoe,* 186 F.3d at 288-89 (2d Cir. 1999) (holding that copyright defendant's reliance on a defense was unreasonable when the Fifth Circuit had previously concluded that the plaintiff's copyright was valid and enforceable). This principle does not dispose fully of Panorama's position because the April 22, 2003, consent order did not resolve any issues on the merits. To the contrary, the order stated that it "shall not be construed as a finding of any fact by the [District] Court or a finding by the [District] Court that Plaintiff has established ... any ... substantive element of its case." J.A. at 202 (4/22/03 Dist. Ct. Order).

This caveat, however, does not justify Panorama's continued reliance on its fair-use defense. By entering into the consent decree, Panorama agreed to cease infringing Zomba's copyrights. Thus, it implicitly agreed to suspend its reliance on the fair-use defense at least temporarily, and this agreement was reduced to an order of the court. Because an order entered by

a court of competent jurisdiction must be obeyed even if it is erroneously issued, *see Walker v. City of Birmingham,* 388 U.S. 307, 321, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967), Panorama lacked any legal justification for continuing to distribute copies of Zomba's copyrighted works after April 22, 2003. Without expressing any opinion regarding the reasonableness of Panorama's position before that date, we are certain that from April 22, 2003, on, the law applicable to this case "supported [Zomba's] position so clearly that [Panorama] must be deemed as a matter of law to have exhibited a reckless disregard of [Zomba's] property rights." *Princeton Univ. Press,* 99 F.3d at 1392. On this basis, we agree with the district court's conclusion that Panorama's infringements were willful and accordingly justified enhanced statutory damages.

C. Amount of Statutory-Damage Award

Panorama next challenges the district court's $806,000 statutory-damage award. First, it argues that the district court abused its discretion in calculating the award. Next, it argues that the awards are disproportionate and unreasonable under the Eighth Amendment and the Fifth Amendment's Due Process Clause.

1. Abuse of Discretion

Panorama contends that the district court believed that, after making a finding of willfulness, it lacked discretion to award statutory damages of less than $30,000 per infringement. On this basis, Panorama

maintains that the district court abused its discretion. The record does not support this argument.

In its conclusions of law, the district court recognized that it had "wide discretion in determining the amount of statutory damages to be awarded, constrained only by the maximum and minimum amounts." J.A. at 164 (12/5/05 Dist. Ct. Op. at 7). It found "that the maximum statutory amount of $30,000 per work for 'innocent' infringement is not sufficient in this case because of the clearly willful nature of Defendant's conduct," but that the maximum award of $150,000 per infringement was excessive, given the dollar amounts involved in the case. J.A. at 164-65 (*id.* at 7-8).

Nowhere did the district court indicate that it believed that it lacked discretion to award statutory damages of less than $30,000 per infringement. To the contrary, Panorama's willfulness prompted the district court to conclude that the maximum penalty for nonwillful infringement was *not sufficient* given Panorama's conduct. We therefore conclude that Panorama has not shown that the district court abused its discretion by setting the statutory damage award at $31,000 per infringement.

2. Eighth Amendment

Panorama next argues that such a high award of statutory damages, in light of the relatively low actual

damages,[10] renders the district court's award an "excessive fine" under the Eighth Amendment. However, the Supreme Court has explained that the word "fine" in this context means a payment to the *government*. *United States v. Bajakajian,* 524 U.S. 321, 327, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). Consequently, the Court has held that the Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 264, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). Panorama's Eighth Amendment argument thus fails.

3. Due Process

Panorama argues, based upon *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408,

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[10] The district court concluded that it was unable to calculate the actual damages based on the record before it. Panorama asserted that it sold a total of 74,734 copies of the twenty-six infringed compositions. Based upon this figure, Zomba lost approximately $11,957.92 in royalties, plus an additional $6500 in fixing fees, for a total of $18,457.92.

Additionally, Panorama asserted that its net profit attributable to the twenty-six compositions at issue was $9693.86, although Panorama never substantiated its expenses to the district court. Assuming arguendo that this profit figure is accurate, Zomba would have been entitled to $28,151.78 if it had not elected to pursue statutory damages. *See* 17 U.S.C. § 504(b).

123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), that an award of statutory damages that (it alleges) is thirty-seven times the actual damages violates its right to due process. Again, we disagree.

We note at the outset that both *Gore* and *Campbell* addressed due-process challenges to *punitive*-damages awards. In both cases, the award was greater than one hundred times the amount of compensatory damages awarded. In *Gore,* the Court concluded that the award in question (which amounted to 500 times the compensatory-damages award) was "grossly excessive," 517 U.S. at 574, 116 S.Ct. 1589, after considering three "guideposts": (1) "the degree of reprehensibility of the" defendant's conduct; (2) "the disparity between the harm or potential harm suffered by [the plaintiff] and [the] punitive damages award"; and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases," *id.* at 575, 116 S.Ct. 1589. In *Campbell,* the Court considered the same three guidepost factors and concluded that the punitive-damages award (which amounted to 145 times the compensatory-damages award) "was an irrational and arbitrary deprivation of the property of the defendant." 538 U.S. at 429, 123 S.Ct. 1513. Regarding the second guidepost, neither case created a "concrete constitutional limit[ ]" to the punitive-to-compensatory damages ratio. *Id.* at 424, 123 S.Ct. 1513. Instead, the *Campbell* Court explicitly "decline[d] ... to impose a bright-line ratio which a punitive damages award cannot exceed," although it expressed a general preference for single-digit ratios. *Id.* at 425, 123 S.Ct. 1513.

The Supreme Court has not indicated whether *Gore* and *Campbell* apply to awards of *statutory* damages. We know of no case invalidating such an award of statutory damages under *Gore* or *Campbell*, although we note that some courts have suggested in dicta that these precedents may apply to statutory-damage awards. *See, e.g., Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (suggesting that "in a sufficiently serious case," due process may require courts to reduce a statutory-damage award in a class action, and citing both *Campbell* and *Gore*); *Leiber v. Bertelsmann AG* (*In re Napster, Inc. Copyright Litig.*), Nos. C MDL-00-1369 MHP & C 04-1671 MHP, 2005 WL 1287611, at *10 (N.D. Cal. June 1, 2005) (unpublished) (citing *Gore* and *Campbell*); *DirecTV v. Gonzalez*, No. Civ.A.SA-03-1170 SR, 2004 WL 1875046, at *4 (W.D. Tex. Aug. 23, 2004) (unpublished) (citing *Campbell*); *but see Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F.Supp.2d 455, 459-60 (D. Md. 2004) (concluding that *Gore* and *Campbell* do not limit statutory damages in copyright cases).

Regardless of the uncertainty regarding the application of *Gore* and *Campbell* to statutory-damage awards, we may review such awards under *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67, 40 S.Ct. 71, 64 L.Ed. 139 (1919), to ensure they comport with due process. In such cases, we inquire whether the awards are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at 67, 40 S.Ct. 71. This review, however, is extraordinarily deferential-even more so than in cases applying abuse-of-discretion review. *Douglas v. Cunningham*, 294 U.S. 207, 210, 55 S.Ct. 365, 79 L.Ed. 862 (1935) (Congress's purpose in

enacting the statutory-damage provision of the 1909 Copyright Act and its delineation of specified limits for statutory damages "take[] the matter out of the ordinary rule with respect to abuse of discretion"); *Broad. Music, Inc. v. Star Amusements, Inc.*, 44 F.3d 485, 487 (7th Cir. 1995) (interpreting the modern Copyright Act and noting "that the standard for reviewing an award of statutory damages within the allowed range is even more deferential than abuse of discretion").

Williams is instructive, and leads us to conclude that the statutory-damage award against Panorama was not sufficiently oppressive to constitute a deprivation of due process. In that case, a railroad charged two sisters sixty-six cents apiece more than the maximum rate permissible by regulation. 251 U.S. at 64, 40 S.Ct. 71. A state statute sought to deter such overcharges by providing for statutory damages of between $50 and $350 when a railroad charged more than the permissible rate. *Id.* The sisters sued separately, and received statutory damage awards of $75 apiece–over 113 times the amount they were overcharged. *Id.* Before the Supreme Court, the railroad argued that the penalty was so disproportionate to the harm sustained that it violated due process. Rejecting this argument, the Court concluded that the award "properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." *Id.* at 67, 40 S.Ct. 71.

If the Supreme Court countenanced a 113:1 ratio in *Williams,* we cannot conclude that a 44:1 ratio[11] is unacceptable here. We acknowledge the Supreme Court's preference for a lower punitive-to-compensatory ratio, as stated in *Campbell,* but emphasize that this case does not involve a punitive-damages award. Until the Supreme Court applies *Campbell* to an award of statutory damages, we conclude that *Williams* controls, not *Campbell,* and accordingly reject Panorama's due-process argument.[12]

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[11] Dividing the statutory-damage award ($806,000) by the lost licensing fees, as calculated by Panorama, ($18,458) yields a ratio of about 44:1. The 37:1 figure that Panorama advances in its brief includes in the denominator Panorama's unsubstantiated net profits figure of $9693.86. This sum is separate from the "actual damages," as defined by 17 U.S.C. § 504(b), which permits a copyright plaintiff to elect to receive "the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and not taken into account in computing the actual damages."

[12] The Supreme Court's recent decision in *Philip Morris USA v. Williams,* --- U.S. ----, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007), which was issued after the parties submitted their briefs but before oral argument, does not alter our analysis. There, the Supreme Court considered only "whether the Constitution's Due Process Clause permits a jury to base [a punitive-damage] award in part upon its desire to *punish* the defendant for harming persons who are not before the court." *Id.* at 1060. As there is absolutely no indication that the district court based its award of statutory damages on Panorama's conduct vis-à-vis copyright holders other than Zomba, *Philip Morris USA* is inapposite.

D. Motion to Transfer

We review denials of motions to transfer to determine whether the district court abused its discretion. *Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531, 533 (6th Cir. 2002). Panorama argues that the district court erred by refusing to transfer the case pursuant to 28 U.S.C. § 1404(a). Panorama's original motion to transfer asked the district court to transfer the case to the U.S. District Court for the Southern District of New York, the U.S. District Court for the District of Massachusetts, or the U.S. Bankruptcy Court for the District of Massachusetts. However, on appeal Panorama argues only that the district court should have transferred the case to the bankruptcy court. Panorama offers two bases for its argument: (1) the parties, witnesses, and events of the case lacked ties to Tennessee; and (2) the case was related to a bankruptcy proceeding in Massachusetts.

The first of Panorama's arguments is factually inaccurate, as the infringing materials were recorded in Nashville, and Howard, who served as a witness, communicated with Panorama from her Nashville office. Further, Nashville was the site of the infringements in question, as Panorama hired Nashville musicians to record copies of the relevant compositions in Nashville. The second argument similarly fails, as 28 U.S.C. § 1334(b) states that district courts "have original but not exclusive jurisdiction of all civil proceedings ... related to cases under title 11." This provision does not deprive a district court of jurisdiction over cases "related to" a pending bankruptcy, nor does it even indicate that the proper course of action is to transfer such cases to the

bankruptcy court. Notably, Panorama cites no cases holding that a district court abuses its discretion by refusing to transfer a related case to a bankruptcy court. And just as notably, at the November 5, 2005, damages hearing, Panorama's counsel conceded that the district court had the authority to proceed.

Furthermore, Panorama did not move to transfer venue until July 25, 2005, which is more than a year after it filed for bankruptcy and more than two-and-a-half years after Zomba first filed its complaint. Panorama does not suggest any reason why the district court's refusal to grant such a tardy motion constitutes an abuse of discretion. Accordingly, we reject this challenge to the district court's judgment.

E. Attorney fees

Lastly, Panorama argues that the district court abused its discretion by awarding attorney fees to Zomba. The Copyright Act provides that "the [district] court in its discretion may allow the recovery of full costs ... [and] may also award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505. In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994), the Supreme Court endorsed in dicta a series of factors "to guide courts' discretion" in awarding attorney fees. *Id.* at 534 n.19, 114 S.Ct. 1023. The factors include "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Id.* (internal quotation and citation omitted).

According to Panorama, the district court abused its discretion by failing to consider the *Fogerty* factors. However, as Zomba notes, the parties provided the district court with briefing focused on the factors, so even if the district court did not precisely recount its assessment of the factors, it was alerted to them. Further, given the unreasonableness of Panorama's positions and the need to deter such conduct, it is difficult to see how the imposition of attorney fees here could qualify as an abuse of discretion.[13]

IV. CONCLUSION

For the reasons stated above, we **AFFIRM** the district court's judgment in all respects.

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[13] Panorama cites *Ronald Mayotte & Associates v. MGC Building Co.*, No. 97-1483, 1998 WL 385905 (6th Cir. July 1, 1998) (unpublished), claiming that "this court reversed an award of attorney fees for failure of the district court to properly consider" the *Fogerty* factors. Appellant's Br. at 61. Two problems with this argument are apparent. First, *Ronald Mayotte* is an unpublished case, something that Panorama fails to acknowledge even in its citation. More importantly, however, Panorama misstates the holding. The *Ronald Mayotte* panel actually affirmed a refusal to award attorney fees, notwithstanding the district court's failure to discuss explicitly the *Fogerty* factors.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

No. 3:03-0042

[Filed January 23, 2006]

ZOMBA ENTERPRISES, et al.	)
	)
v.	)
	)
PANORAMA RECORDS, INC.	)
	)

ORDER

Pending before the Court is Plaintiffs' Application for Attorneys' Fees and Non-Taxable Costs (Docket No. 112). Plaintiffs seek attorneys' fees in a total amount of $76,465.16 and nontaxable costs totaling $1,058.91.

Federal law provides that in a copyright infringement action, such as this one, the court in its discretion may allow the recovery of full costs and may award reasonable attorney's fee to the prevailing party. 17 U.S.C. § 505. In this action, Plaintiffs were the prevailing parties. The Court entered judgment in favor of Plaintiffs against Defendant in a total amount of $806,000 statutory damages.

The Court finds Plaintiffs' requests for fees and costs is reasonable in light of Plaintiffs' success on the merits of their claims and the time and effort required. Plaintiffs' Application (Docket No. 112) is APPROVED. Plaintiffs are awarded against Defendant attorneys' fees in the amount of $76,465.16 and costs in the amount of $1,058.91.

IT IS SO ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

No. 3:03-0042

[Filed December 5, 2005]

ZOMBA ENTERPRISES, et al.	)
	)
v.	)
	)
PANORAMA RECORDS, INC.	)
	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 18, 2004, the Court granted summary judgment in favor of the Plaintiffs on the issue of infringement. Docket No. 61. The Court held a bench trial on the issue of damages on November 4, 2005. Based upon the evidence presented at trial and the record, the Court makes the following findings and fact and conclusions of law, pursuant to Fed. R. Civ. P. 52.

FINDINGS OF FACT

1. Defendant Panorama Records, Inc. began selling karaoke discs containing recordings of musical

compositions in 1998. (Trial Transcript, Docket No. 100, at 27).

2. Laurindo Santos is one of the shareholders of Panorama and served as Panorama's corporate representative at trial. (*Id.* at 25-26).

3. Mr. Santos testified that he is the person within Panorama who made all decisions regarding the release of products and management of the company. (*Id.* at 26).

4. Since 1998, Panorama has sold hundreds of products that collectively contained thousands of unlicensed musical compositions. (*Id.* at 27-29 and 33).

5. Panorama did not seek permission from any copyright holders to exploit copyrighted works prior to the original date of release. (*Id.* at 33).

7. One of those copyright holders, Without-Anna-Music, was represented by Nashville attorney Linda Edell Howard. Ms. Howard testified at trial. (Trial Transcript at 7).

8. Ms. Howard notified Panorama of its infringement of Without-Anna-Music's copyrighted works. (*Id.* at 8).

9. During communications regarding the Without-Anna-Music copyrights, Ms. Howard advised Panorama that it was "in violation of copyright law," to which Mr. Santos replied, "Okay, we'll license." (*Id.* at 34).

10. Prior to the contact from Ms. Howard, Panorama had never paid licensing fees. (*Id.* at 61).

11. Based on those communications between Mr. Santos and Ms. Howard, Panorama understood in 2000 that copyright owners were claiming that its karaoke products infringed copyrights. (*Id.* at 37).

12. Nonetheless, Panorama failed to obtain permission from Plaintiffs Zomba Enterprises, Inc. and Zomba Songs, Inc. ("Zomba") before exploiting Zomba's musical compositions. (*Id.* at 25-26).

13. While negotiating licenses with Without-Anna-Music, Panorama hired the former head of licensing at The Harry Fox Agency, Vincent Castalucci, to advise the company about licensing requirements for exploitation of copyrighted works on karaoke products. (*Id.* at 37).

14. The Harry Fox Agency is a licensing agent for musical-composition copyrights. (*Id.* at 11).

15. Mr. Castalucci confirmed for Mr. Santos that licenses were required for karaoke products:

> Q: When you contacted Mr. Castalucci, you asked him whether Panorama needed licenses; is that correct?
>
> A: I assumed as of the time that I contacted Ms. Edell [Howard] that I needed to obtain licenses.
>
> Q: And Mr. Castalucci affirmed Ms. Edell's advice, didn't he?

A: Yes.

Q: Mr. Castalucci, your own expert in copyright and licensing, advised you that Panorama needed to secure licenses in order not to infringe copyrights; is that correct?

A: I hired Mr. Castalucci to obtain licensing for us based on the fact that Ms. Edell's accusations that I assumed that I have to pay license.

Q: And Mr. Castalucci himself also told you that you needed to pay or secure licenses, didn't he?

A: He reaffirmed that also.

(*Id.* at 38).

16. Even after receiving advice from Mr. Castalucci, Panorama continued to exploit Zomba's musical compositions and continued to release new products without obtaining or even requesting Zomba's permission. (*Id.* at 40, 55).

17. Since 1998, Panorama has released monthly products in four genres, pop, R&B, rock and country, each of which included nine to ten recordings of copyrighted musical compositions, totaling thousands of infringements. (*Id.* at 26-33).

18. In February and April 2002, Ms. Howard, now acting on Zomba's behalf, informed Panorama on two occasions that the unauthorized use of Zomba's musical compositions constituted copyright

infringement and demanded that Panorama cease all such exploitation. (Trial Exhibits 1 & 2).

19. At trial, Ms. Howard offered the following testimony about her February 2002 letter to Panorama:

> Q: And the next to the last paragraph of your letter, you made certain demands. How would you characterize those demands?
>
> . . .
>
> A. Well, that was really to put them on notice that magic language, cease and desist, that they should no longer be doing this, putting out any type of karaoke products with unlicensed copyrights. And that if it continued to do so, they could be responsible for willful or intentional copyright infringement.

(Trial Transcript at 12).

20. Panorama ignored those demands, continued to produce and release infringing products, and continued to sell existing products which Panorama knew infringed copyrights owned by Plaintiffs:

> Q. Mr. Santos, after you received Ms. Howard's demand letters, Panorama continued to release karaoke products without licenses; is that correct?
>
> A: Yes, sir.

(*Id.* at 40).

21. In addition to asking Panorama to cease and desist further infringement of Plaintiffs' musical compositions, Ms. Howard also demanded that Panorama provide Zomba with accountings for past infringements, which Panorama failed to do. (*Id.* at 14).

22. Plaintiffs commenced this action in January 2003, claiming that Panorama had infringed certain copyrights and requesting a preliminary injunction to prevent Panorama from continuing to profit from its unlawful conduct. (Docket No. 1).

23. Panorama continued to sell the infringing products after this lawsuit was filed. (Trial Exhibit 3).

24. Panorama agreed to an Order in April 2003 prohibiting the sale of infringing works (Docket No. 13), and yet, within four days of the entry of that Order, Panorama resumed the sale of infringing works:

> Q: And in fact your records, Panorama's records show that after the April 22, 2003 injunction was entered, the company continued to sell products four days later, April 26, 2003 containing compositions that are the subject of this lawsuit; isn't that correct, Mr. Santos?
>
> A: If the records show that, it's got to be.

(Trial Transcript at 46).

25. In fact, Mr. Santos could not confirm that he ever told his colleagues at Panorama to stop selling the

infringing works after this Court entered its April 22, 2003 Order. (*Id.* at 44-46).

26. Panorama never returned to the Court to seek relief from that Order or to advise the Court that sales of the infringing works had resumed. (*Id.* at 44).

27. After Zomba asked the Court to hold Panorama in contempt for violating the Court's April 2003 Order, Panorama's counsel, Darwin A. Hindman, moved to withdraw. (Docket No. 51).

28. Panorama was given time to find successor counsel, but no lawyer entered an appearance on the company's behalf before the deadline established by the Court. (Docket Nos. 54 & 56).

29. The Court granted summary judgment for the Plaintiffs on June 18, 2004 on the issue of infringement and denied Defendant's Motion for Summary Judgment based upon the "fair use" defense. (Docket No. 62).

30. Panorama continued to sell unlicensed products, including at least one of the musical compositions at issue in this case, "That's The Way It Is," as evidenced by counsel's live demonstration in court that infringing products were still being offered on Defendant's website during the trial. (Trial Transcript at 33-34, 54-55, 57-58).

31. Despite the deadlines set forth in the Scheduling Order, Panorama failed to timely file any of the required pretrial documents and failed to comply with the Court's Order concerning the Notice of

Appearance of new counsel and filing a response to a pending Motion for Sanctions. (Docket No. 68).

32. Panorama filed for Chapter 11 bankruptcy protection days before the August 2004 trial on the issue of damages. (Docket No. 75).

33. The Bankruptcy Court later lifted the automatic stay, and this Court held a bench trial on the issue of damages on November 4, 2005. (Docket Nos. 89, 90 & 92).

34. There are 26 compositions at issue in this case. (Trial Transcript at 26, Docket Nos. 62 & 69).

35. Defendant claims that its net profit for the use of the 26 compositions at issue is $9,693.86. (Trial Exhibit 3 and Trial Transcript at 72).

36. Defendant claims that the total number of times the 26 compositions were sold is 74,734. (*Id.* at 70-72; Trial Exhibit 3).

37. Multiplying the 26 compositions by the $250 fixing fee set forth in Zomba's cease and desist letter produces a sum of $6,500.00. Multiplying the 74,737 units sold by the $.16 royalty rate quoted by Zomba's attorney produces a sum total of $11,957.92. (Trial Exhibits 2 & 3).

38. The Court cannot calculate actual damages on the record before it.

39. Zomba has elected to seek statutory damages pursuant to 17 U.S.C. § 504(c)(1). (Docket Nos. 70 and 97).

40. Zomba has demanded the maximum statutory damages of $150,000 per work for willful infringement, for a total of $3,900,000. (Docket No. 97).

CONCLUSIONS OF LAW

Federal law provides for the recovery of damages by a copyright owner whose works have been infringed. 17 U.S.C. § 504. A copyright owner may elect to recover, instead of actual damages and profits, an award of statutory damages in a sum of not less than $750 or more than $30,000 as the court considers just. 17 U.S.C. § 504(c)(1). Plaintiffs have elected to recover statutory damages in this case.

If the copyright owner proves, and the court finds, that the infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000. 17 U.S.C. § 504(c)(2). Plaintiffs claim that Defendant's infringements were committed willfully.

To prove willfulness, Plaintiffs must show that Defendant had actual or constructive knowledge that it was infringing the Plaintiffs' copyrights or else acted in reckless disregard of the high probability that it was infringing Plaintiffs' copyrights. *Arclight and Films Pvt, Ltd. v. Video Palace Inc.*, 303 F.Supp.2d 356, 361-62 (S.D. N.Y. 2003); *Peer Int'l Corp. v. Pausa Records, Inc*, 909 F.2d 1332, 1335, n. 3 (9th Cir. 1990). To refute evidence of willful infringement, Defendant must not

only establish its good faith belief in the innocence of its conduct, but it must also show that it was reasonable in holding such a belief. *Id.* at 1336.

The Court finds that Defendant's infringement of Plaintiffs' copyrights in this case was willful. Defendant continued to sell Plaintiffs' compositions after receiving notice, through Ms. Howard, that it was infringing the copyrights on those compositions. Defendant continued to sell Plaintiffs' compositions after Plaintiffs filed the Complaint in this action. Defendant continued to sell Plaintiffs' compositions after the Court entered an Agreed Order prohibiting the sale of infringing works. Indeed, Plaintiffs' counsel even demonstrated in court, at the time of trial, that Defendant was still offering to sell works which infringed Plaintiffs' copyrights. In addition, the Court may infer that Defendant willfully infringed Plaintiffs' copyrights because of Defendant's default and failure to obey Court Orders in this action. *Arista Records, Inc. v. Beker Enterprises, Inc.*, 298 F.Supp.2d 1310, 1313 (S.D. Fla. 2003). Defendant has not established a good faith belief in the innocence of its conduct or that it was reasonable in holding such a belief.

The Court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the maximum and minimum amounts. *Peer Int'l*, 909 F.2d at 1336; *Arclight*, 303 F.Supp.2d at 362. Many factors influence an award of statutory damages for copyright infringement, including the expenses saved and the profits earned by the defendant, the revenues lost by the plaintiff, the deterrent effect, if any, that such an award will have on the defendant and on third parties, the cooperation

of the defendant in providing evidence concerning the value of the infringing material, the defendant's state of mind, and the conduct and attitudes of the parties. *Id.*

Statutory damages are not intended to provide a plaintiff with a windfall recovery. *National Football League v. Primetime 24 Joint Venture*, 131 F.Supp.2d 458, 478, n.17 (S.D.N.Y. 2001). On the other hand, statutory damages can take on a "partially punitive character" to serve a deterrent purpose. *Id.* Statutory damages are designed not solely to compensate the copyright owner for losses incurred, but also to deter future infringement. *Johnson v. Jones*, 149 F.3d 494, 504 (6th Cir. 1998). Even for noninjurious and unprofitable invasions of copyright, the Court may, if it deems just, impose a liability within statutory limits to sanction and vindicate the statutory policy of discouraging wrongful conduct. *Arclightz*, 303 F.Supp. 2d at n.37.

In this case, the Court is convinced that Defendant's infringing conduct was clearly willful. On the other hand, the dollar amounts of the benefits to Defendant and the damages to Plaintiffs are not high. The Court finds that the maximum statutory amount of $30,000 per work for "innocent" infringement is not sufficient in this case because of the clearly willful nature of Defendant's conduct. The maximum statutory amount of $150,000 per work for willful infringement, on the other hand, is excessive under the circumstances of this case, particularly the dollar amounts involved.

Therefore, in light of the number of willful infringements, the continued willful infringing conduct, the dollar amounts involved, and the need to deter further willful infringement, the Court finds that Plaintiffs are entitled to an award of $ 31,000 for each of the 26 compositions, or a total of $ 806,000.

Plaintiffs shall submit, in accordance with Rule 13(e) of the Local Rules of Court, their application for attorneys' fees and costs.

This Order shall constitute the judgment in this case pursuant to Fed. R. Civ. P. 58.

IT IS SO ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

No. 3:03-0042

[Filed August 9, 2005]

ZOMBA ENTERPRISES, et al.	)
	)
v.	)
	)
PANORAMA RECORDS, INC.	)
	)

ORDER

Pending before the Court are Defendant's Motion to Set Aside Default (Docket No. 79), Defendant's Motion to Change Venue (Docket No. 80), Defendant's Motion for Reconsideration (Docket No. 81), and Plaintiffs' Motion for a Status Conference (Docket No. 85).

On August 9, 2004, the Court stayed this case, pursuant to 11 U.S.C. § 362, and closed the case administratively, in light of Defendant's bankruptcy. Docket No. 76. Neither party has filed a motion to reopen the case or any evidence that the bankruptcy stay has been lifted, although Plaintiffs have

represented that the bankruptcy court lifted the stay as to this matter.

Therefore, on or before Monday, August 15, 2005, Defendant shall file with the Court evidence that the bankruptcy stay has been lifted.

Defendant's Motion to Set Aside Default (Docket No. 79) is DENIED; Defendant's Motion to Change Venue (Docket No. 80) is DENIED; and Defendant's Motion for Reconsideration (Docket No. 81) is DENIED. Defendant has presented no new information which persuades the Court to change its prior rulings in this matter. In light of this Order, Plaintiffs' Motion for a Status Conference (Docket No. 85) is also DENIED.

At the time of the stay, the only remaining issue was Plaintiff's damages. Accordingly, this action is set for a hearing on the issue of damages on Wednesday, September 7, 2005, at 1:00 p.m. At the hearing, counsel for the parties shall be prepared to present proof and argument concerning Plaintiffs' claim for damages.

IT IS SO ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

No. 3:03-0042

[Filed July 29, 2004]

ZOMBA ENTERPRISES, et al.	)
	)
v.	)
	)
PANORAMA RECORDS, INC.	)
	)

ORDER

This matter is set for a bench trial on August 10, 2004, on the remaining issue of damages.[1] Counsel for the Plaintiff appeared for the scheduled pretrial conference on July 29, 2004, at 1:00 p.m. No one appeared at the pretrial conference on behalf of the Defendant.

In addition, Defendant failed to timely file any of the required pretrial documents. *See* Docket No. 26.

[1] The Court previously entered judgment for the Plaintiff on the issue of liability. Docket No. 62.

Furthermore, Defendant failed to comply with the Court's Order concerning the Notice of Appearance of new counsel and filing a response to the pending Motion for Sanctions. *See* Docket No. 54.[2]

In accordance with Rule 55(a) of the Federal Rules of Civil Procedure, the Court finds that Defendant has failed to "otherwise defend" with regard to the remaining issue of damages in this action by failing to appear for the pretrial conference, failing to file its pretrial documents, and failing to abide by the Court's prior Orders. Therefore, in accordance with Rule 55(a) and as a sanction for failure to comply with the Court's Orders, default is hereby entered against Defendant on the issue of damages.

Unless Defendant files a Notice of Appearance of new counsel and all the required pretrial documents by August 6, 2004, and appears in this Court on Monday, August 9, 2004, at 2:00 p.m., the Court will enter default judgment against Defendant on the issue of damages and the August 10, 2004 trial will be canceled.

Counsel for the Plaintiff shall file and serve, in accordance with Fed. R. Civ. P. 55(b)(2), an Application for Default Judgment on the issue of damages on or before August 4, 2004. At the hearing on August 9, 2004, counsel for the Plaintiff shall be prepared to

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[2] Plaintiff was ordered to file these documents by June 1, 2004. On June 16, 2004, the Court received a letter from Defendant requesting an additional thirty days to find new counsel. Docket No. 60. That additional thirty days expired on July 16, 2004.

present proof and argument concerning its claim for damages and its pending Motion for Sanctions (Docket No. 39).

Defendant is again advised that failure to abide by the Court's Orders may result in judgment against it.

IT IS SO ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

No. 3:03-0042

[Filed June 18, 2004]

ZOMBA ENTERPRISES, et al.	)
	)
v.	)
	)
PANORAMA RECORDS, INC.	)
	)

ORDER

Pending before the Court are Defendant's Motion for Summary Judgment (Docket No. 27); Plaintiffs' Motion for Summary Judgment (Docket No. 32); Plaintiffs' Motion for Sanctions (Docket No. 39); Defendant's Motion to Amend Responses to Request for Admissions (Docket No. 41); and Plaintiffs' Motion to Strike Portions of the Affidavit of Laurindo Santos (Docket No. 49).

For the reasons stated in the accompanying Memorandum, Defendant's Motion for Summary Judgment (Docket No. 27) is DENIED; Plaintiffs' Motion for Summary Judgment (Docket No. 32) is

GRANTED; Defendant's Motion to Amend Responses to Request for Admissions (Docket No. 41) and Plaintiffs' Motion to Strike Portions of the Affidavit of Laurindo Santos (Docket No. 49) are moot. Plaintiffs' Motion for Sanctions (Docket No. 39) will be addressed by separate Order.

The remaining issue of damages will be tried on the previously scheduled trial date of August 10, 2004.

IT IS SO ORDERED.

/s/ _____
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

MEMORANDUM

Pending before the Court are Defendant's Motion for Summary Judgment (Docket No. 27); Plaintiffs' Motion for Summary Judgment (Docket No. 32); Plaintiffs' Motion for Sanctions (Docket No. 39); Defendant's Motion to Amend Responses to Request for Admissions (Docket No. 41); and Plaintiffs' Motion to Strike Portions of the Affidavit of Laurindo Santos (Docket No. 49).

For the reasons stated herein, Defendant's Motion for Summary Judgment (Docket No. 27) is DENIED; Plaintiffs' Motion for Summary Judgment (Docket No. 32) is GRANTED; Defendant's Motion to Amend Responses to Request for Admissions (Docket No. 41) and Plaintiffs' Motion to Strike Portions of the Affidavit of Laurindo Santos (Docket No. 49) are moot. Plaintiffs' Motion for Sanctions (Docket No. 39) will be addressed by separate Order.

This copyright infringement action presents the single issue of whether karaoke is entitled to "fair use" protection under federal copyright laws in this case. The Court finds that it is not.

Plaintiffs are publishing corporations who own and/or administer the copyrights of musical compositions recorded by many of today's recording artists. Defendant is a corporation in the business of marketing and distributing karaoke packages.[1]

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[1] Karaoke packages typically include recordings of the words and music of a popular recording, performed by someone other than

Plaintiffs contend that Defendant has released, without permission, infringing products containing copies of thirty separate musical compositions owned and/or administered by Plaintiffs. Defendant does not deny that it used musical compositions for which Plaintiffs own or administer copyrights; rather, Defendant contends that its use of these compositions to create CD+Gs[2] is entitled to "fair use" protection under the Copyright Act of 1976. The parties have filed cross-Motions for Summary Judgment on this legal issue.

SUMMARY JUDGMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Williams v. Mehra*, 186 F.3d 685,689 (6th Cir. 1999). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *Id.*; *Bob Tatone Ford, Inc. v. Ford Motor Co.*, 197 F.3d 787, 790 (6th Cir. 1999).

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the recording artist or group that popularized the song, plus a separate recording of the performance with the music and no accompanying lyrical performance, a written copy of the lyrics, and a synchronized display of the lyrics with a visual image on a screen. Verified Complaint, ¶ 8.

[2] CD+Gs are compact discs which produce both audio and visual outputs. Docket No. 48, ¶ 5.

To prevail, the non-movant must show sufficient evidence to create a genuine issue of material fact. *Williams*, 186 F.3d at 689. A mere scintilla of evidence is insufficient; there must be evidence on which the jury could reasonably find for the non-movant. *Id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Entry of summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Williams*, 186 F.3d at 689.

A dispute about a material fact is "genuine" within the meaning of Rule 56 only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 106 S.Ct. at 2510. The non-moving party may not merely rest on conclusory allegations contained in the complaint, but must respond with affirmative evidence supporting its claims and establishing the existence of a genuine issue of material fact. *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989).

"FAIR USE" EXCEPTION

The "Fair Use" Exception to the federal copyright laws permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster. *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996); *Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct. 1164, 1170 (1994). The statutory exception provides that the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or

research, is not an infringement of copyright. 17 U.S.C. § 107.

Defendant does not contend that its use is "criticism, comment news reporting, teaching, scholarship or research." Defendant argues, rather, that its use is fair because its customers may use the subject recordings for criticism or parody. It is Defendant's use, however, that is relevant; not the use put to Defendant's product by Defendant's customers. In the *Princeton* case, for example, the court held:

> It is true that the use to which the materials are put by the students who purchase the coursepacks is noncommercial in nature. But the use of the materials by the students is not the use that the publishers are challenging. What the publishers are challenging is the duplication of copyrighted materials for sale by a for-profit corporation that has decided to maximize its profits – and give itself a competitive edge over other copyshops – by declining to pay the royalties requested by the holders of the copyrights.

Princeton at 1386. Similarly, here, Defendant sells karaoke CD+Gs to make a profit. The nature of Defendant's use of Plaintiffs' copyrighted works is commercial.

In determining whether the use made of a work in any particular case is a "fair use," the factors to be considered include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the

nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107. "The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." *Campbell*, 114 S.Ct. at 1170. Nor may the four statutory factors be treated in isolation, one from another; rather, all are to be explored, and the results weighed together, in light of the purposes of copyright. *Id.* at 1171.

The first factor, purpose or character of the use, includes whether the use is commercial or non-commercial. Defendant argues that karaoke is a form of free expression and creativity which should not be subject to licensing. Defendant maintains that karaoke products are new, innovative, transformed works which are produced in a different medium, for a different purpose, and in a different market than Plaintiffs' copyrighted materials. As explained above, however, the Court finds that Defendant's use of the subject compositions is commercial .

Defendant argues that its use of Plaintiffs' copyrighted works is "transformative." The Supreme Court stated in *Campbell* that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Campbell* at 1171. Karaoke is not transformative, however. Defendant uses, in its product, the entire musical composition copyrighted by Plaintiffs. The lyrics and the music are the same.

The next factor, the nature of the copyrighted work, also favors Plaintiffs in this case. There is no question that Plaintiffs' work are entitled to copyright protection.

As for the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, Defendant has admitted that in order to create a karaoke work, it must be allowed the use of the entire song. Docket No. 28, p. 16. Defendant does not change the lyrics or the underlying musical composition. Again, this factor favors a finding of no fair use exception.

The fourth factor is the effect of the use upon the potential market for or value of the copyrighted work. It requires the court to consider not only the extent of market harm caused by the particular acts of the alleged infringer, but also whether "unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original." *Campbell*, 114 S.Ct at 1177. The burden of proof as to market effect rests with the copyright holder if the challenged use is of a noncommercial nature. The alleged infringer has the burden, however, if the challenged use is commercial in nature. *Princeton* at 1385-86. Here, as indicated above, the nature of the alleged infringement is commercial, so Defendant beats the burden of proving that its use would not affect the potential market for or value of the subject compositions.

Defendant argues that karaoke is not in competition with the music recording or publishing

industries. Defendant also contends that the great public benefit of karaoke mandates a finding of fair use in this case. Rather than substituting for the purchase of these musical products, Defendant argues, karaoke "stimulates a demand for them." Docket No. 28, p. 17. The Court disagrees.

Because Plaintiffs are music publishing companies in the business of licensing works for profit, any unauthorized use of those works affects the potential market for Plaintiffs' copyrighted musical compositions and reduces the value of Plaintiffs' licenses for the copyrighted works.

CONCLUSION

Balancing all the factors and considering the totality of the circumstances presented, the Court finds that Defendant is not entitled to the "fair use" exception. Accordingly, Plaintiffs' Motion for Summary Judgment is GRANTED, and Defendant's Motion for Summary Judgment is DENIED.

Plaintiffs' Motion for Sanctions will be addressed in a separate Order. The remaining issue of damages will be tried as previously scheduled on August 10, 2004.

IT IS SO ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

No. 3:03-0042

[Filed May 10, 2004]

ZOMBA ENTERPRISES, et al.)
)
v.)
)
PANORAMA RECORDS, INC.)
)

ORDER

Pending before the Court, among other things, are Plaintiffs' Motion for Sanctions (Docket No. 39), defense counsel's Motion to Withdraw (Docket No. 51), and defense counsel's Motion Requesting Oral Argument (Docket No. 53).

Defense Counsel's Motion to Withdraw (Docket No. 51) is GRANTED. The Motion Requesting Oral Argument (Docket No. 53) is moot.

Defendant is advised that failure to file a timely response to the pending Motion for Sanctions may result in judgment being entered against it. As noted

by the Court in its previous Order (Docket No. 18), a corporation may not represent itself in litigation. Therefore, Defendant shall file a Notice of Appearance for new counsel on or before June 1, 2004.

IT IS SO ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 06-5013/5266

[Filed October 5, 2007]

Zomba Enters.	)
	)
v.	)
	)
Panorama Records, Inc.	)
	)

BEFORE: BATCHELDER and MOORE, Circuit Judges; and MILLS,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested, a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 06-5016 and 06-5266

[Filed August 1, 2006]

Panorama Records, Inc. Appellant	)
v.	)
Zomba Enterprises, Inc. et. al. Appellee	)

APPELLANT'S MOTION TO TAKE JUDICIAL NOTICE OF CERTAIN FACTS PURSUANT TO FED. R. EVID. 201

Appellant Panorama Records, Inc. ("Panorama") hereby respectfully submits the following Motion To Take Judicial Notice of Certain Facts Pursuant to Fed. R. Evid. 201:

1. Panorama appealed several orders entered by the Middle District of Tennessee (Nashville) including, but not limited to, the District Court's grant of summary judgment against Panorama on the issue of fair use under 17 U.S.C. § 107 with regard to its sale

of karaoke CD+Gs containing 26 of appellee Zomba Enterprises, Inc's ("Zomba")'s copyrighted musical compositions.

2. In its Reply Brief, Panorama requests this Court to take judicial notice of certain facts appearing in news articles concerning the corporate affiliation of Zomba with BMG Music and its resulting share of the global music market. Specifically, Panorama requests this Court to take judicial notice that: a) Sony-BMG's market share is 21.5% as a result of the merger between these companies; b) that this merger was voided by a European Union court, and; 3) that BMG Music Publishing is third largest music publisher in the world. These articles are attached hereto as Exhibits A through E.

3. Additionally, Panorama respectfully requests this Court to take judicial notice of the fact that on the same date it filed suit against Panorama for copyright infringement, Zomba filed six other lawsuits against other karoake manufacturers for copyright infringement, all which were assigned to Hon. Judge Todd J. Campbell. See, Exhibit F, Docket Entries for Zomba v. Sybersound Records, 3:03-cv-00036; Zomba v. Slep-Tone Entertainment, 3:03-cv-00037; Zomba MMO Music Group, Inc., 3:03-cv-00038; Zomba v. Top Tunes, Inc. 3:03-cv-00039; Zomba v. Craig, 3:03-cv-00040; Zomba v. Stellar, Inc., 3:03-cv-00041.

4. Finally, Panorama respectfully requests this Court to take judicial notice of the Order of the Bankruptcy Court for the District of Massachusetts, Hon. Judge Feeney dated 11/30/2004 granting Relief

from Stay. A copy of this Order is attached hereto as Exhibit G.

Dated: _____

Respectfully submitted,

LAWRENCE E. FELDMAN & ASSOCIATES

BY: /s/_____

Lawrence E. Feldman
1432 Tulpehocken Avenue
Elkins Park, PA 19027
(215) 885-3302
(215) 885-3303 (fax)

Attorneys for Appellant Panorama Records, Inc.

* * *

Exhibit A

http://en.wikipedia.org/wiki/BMG
(last visited July 24, 2006)

BMG

From Wikipedia, the free encyclopedia

BMG (Bertelsmann Music Group) is one of the six divisions of Bertelsmann. It was set up in 1987 to combine the music label activities of Bertelsmaan. It consists of the BMG Music Publishing company, the world's third largest music publisher and the world's largest independent music publisher, and the 50% share of the joint venture with Sony Music, Sony BMG Music Entertainment (Sony BMG).

The joint venture with Sony was set up in August 2004. It reduced the Big Five of music companies to the Big Four record labels. The company currently has a 21.5% share in the global music market. [1] (http://www.ifpi.org/site-content/publications/rin_order.html)

Contents

- 1 BMG Music Publishing
- 2 Writers / artists
- 3 Catalogues owned
- 4 See also
- 5 External link

BMG Music Publishing

The chairman and CEO of BMG Music Publishing is Nicholas Firth. The company is headquartered in New York and has 36 offices in 25 countries.

BMG Music Publishing is active in all aspects of music publishing, making it one of the most diverse of all music publishers. BMG is a leading classical music publisher and ranks number one in Production Music and Contemporary Christian music. Uniquely, BMG Music Publishing also has a strong foothold in film/TV, administering the catalogues of many major studios and broadcasting companies..

Writers / artists

BMG Music Publishing, which was not part of the Sony BMG merger and remains wholly owned by Bertelsmann, controls over one million copyrights. Writers/artists signed to the company include Coldplay, Nelly, Britney Spears, Rammstein, R. Kelly, Shania Twain, Ville Valo, Christina Aguilera, Linkin Park, Maroon5, Keane, Hard-Fi, Justin Timberlake, Joss Stone, Elvis Costello, Paul Weller, Sara Evans, and Ne-Yo.

The company's songwriters have written chart-topping hits for Mariah Carey, Black Eyed Peas, Kenny Chesney, The Game, Mario, Shakira, Rascal Flatts, No Doubt, Jessica Simpson and 50 Cent as well as legends like Bob Dylan, Elvis Presley and Frank Sinatra.

BMG Music Publishing is a global leader in Classical music and is number one in Contemporary Christian music and Production Music.

Catalogues owned

Through international subpublishing deals, BMG Music Publishing represents the catalogues of Famous Music (Viacom), Walt Disney, Leiber & Stoller, Pete Waterman and Malaco in various territories.

See also

- List of record labels
- Sony BMG Music Entertainment

External Link

- Official site (http://www.bmgmusic.com/)

Retrieved from "http://en.wikipedia.org/wiki/BMG"

Categories: German record labels | Bertelsmann AG | 1987 establishments

Exhibit B

http://edition.cnn.com/2006/BUSINESS/07/13/sony.bmg.reut/ (last visited July 24, 2006)

WORLD BUSINESS

Sony-BMG merger in trouble

Thursday, July 13, 2006 Posted: 1708 GMT (0108 HKT)

LUXEMBOURG (Reuters) -- A European court annulled the European Union's approval of a 2004 merger between Sony Music and BMG in a surprise decision that could force a break-up of the world's second-biggest music company.

The unprecedented ruling by the European Court of First Instance on Thursday, upholding a challenge to the deal from independent record labels, also cast doubt on the viability of combining EMI Group and Warner Music, which are engaged in a duel to buy each other.

Warner's shares tumbled 15.2 percent to $25.24 on the New York Stock Exchange while EMI's closed down 9.2 percent at 277 3/4 pence in London.

The European Commission said it would have to re-examine the union of Sony and BMG, a 50-50 joint venture between Japanese electronics giant Sony Corp. and German media group Bertelsmann AG. It can also appeal against the ruling.

The decision means Sony Music and BMG, home to such artists as Bruce Springsteen and Kelly Clarkson, have seven days to submit the merger plan anew to the EC, which also would have to consider new industry conditions, including the rapidly growing market for online and mobile phone downloads.

The Commission would then have a month to decide whether to approve it, consider remedies or open a four-month in-depth probe, which could lead to a rejection of the deal.

"If we were to give a red light, then the joint venture would have to be reversed," Commission spokesman Jonathan Todd said during a regular briefing with reporters.

Sony and Bertelsmann said they would review the ruling.

Europe's second-highest court, overturning an EU-approved merger for the first time, said too cursory an examination was conducted into whether there was already collective market dominance in the music industry and whether that dominance might grow following the Sony BMG deal.

Deal chances plummet

EMI and Warner, the world's third- and fourth-largest music companies, respectively, have each offered about $4.6 billion to buy the other, with both bids rejected.

Warner has offered 320 pence a share for EMI, and EMI $31 for each of Warner's shares.

Two people close to the deal, who asked not to be named, told Reuters that talks between the two companies were likely to be suspended because of the ruling.

"It seems to pile on regulatory risk for EMI and Warner, especially at a time when there was an increasing number of people that would have been backing the inevitability of this deal," Credit Suisse analyst Simon Baker said.

Numis analysts slashed their EMI price target by 19 percent to 260 pence from 320 pence following news of the ruling.

London-based EMI told shareholders at its annual meeting on Thursday it still believed buying Warner for $31 a share would be good for them, and that it was studying the court decision.

"I said we would not have made the proposal if we felt we could not receive regulatory approval," EMI Chairman Eric Nicoli said. "There is no reason at this stage to change that view."

Warner also said it was reviewing the decision.

The case against the creation of Sony BMG was brought by Impala, the umbrella trade group for 2,500 independent labels, which claimed that reducing the industry from five major players to four put too much market power in too few hands.

The EU approved the deal believing there was no monopoly among industry goliaths because of a lack of

public fighting among them and the diversity of music available to consumers.

"The elements on which that argument was founded were incomplete and did not include all the relevant data that ought to have been taken into account by the Commission," the court said. "They were therefore not capable of supporting the conclusions drawn from them."

A third source close to the deal said the ruling may not be as bad a setback as it looks, and the EU could still clear the Sony BMG deal as well as pave the way for EMI and Warner.

"A merger between any of the players is possible as long as the Commission doesn't make mistakes in its analysis," the source said.

Along with Vivendi's Universal Music, the world's largest music company, Sony BMG, EMI and Warner account for about three of every four CDs sold globally.

The indies say they would accept a Sony BMG merger only if it included conditions that ensured a level playing field for radio advertising, manufacturing, distribution and other costs.

"The EC had the courage to scrutinize and correct its mistakes," said Hein van der Ree, Impala's vice president and the managing director of Epitaph Europe.

"This locks the door for an EMI/Warner merger, thankfully," he added, "and keeps the doors of market access open for the little guy."

Exhibit C

http://www.eff.org/IP/P2P/?f=riaa-v-thepeople.html
(last visited July 24, 2006)

RIAA v. The People

In July 2003, the Recording Industry Association of America (RIAA) announced it would begin gathering evidence that will be used to sue individuals who use file-sharing software. On September 8, 2003, the recording industry made good on its threat, filing a first wave of 261 lawsuits against individual file-sharers. With 60 million Americans using file-sharing software, more lawsuits are simply not the answer. It's time to get artists paid and make file-sharing legal. If you agree, or want to learn more, check out our Let the Music Play campaign.

P2P Litigation Summit

On November 3, 2005, the following documents will be presented at the first annual P2P Litigation Summit:

- RIAA v. The People: Two Years Later [PDF]
- Parental Liability for Copyright Infringement by Minor Children [PDF 76k] *November 1, 2005*
- Typical Claims and Counterclaims in Peer to Peer Litigation [PDF]
- Bankruptcy Memo [PDF]

Legal Documents

Order Granting Request for Subpoena [PDF 139k] - The Philadelphia court orders that ISPs serve this notice on their users who have been sued as John Does to let them know and give them the opportunity to challenge the case before their names are revealed. *October 12, 2004*

>> A Motion to Ask the Court to Require the Record Companies to Sue You in Your Local Courts

EFF amicus briefs to dismiss distribution claim

- Fonovisa v. Alvarez
  - EFF's amicus brief
- Elektra v. Barker
  - EFF's amicus brief

John Doe Lawsuits

Form of Doe Settlement Agreement [PDF] - The document that Does targeted by the RIAA are being asked to sign.

- **Orders Requiring Severance**
  - Order requiring separate filing [PDF 331k] against individual defendants Cases Filed by Recording Companies, Western District of Texas (Austin Division).
  - In re Cases Filed by Recording Companies, General Order (W.D. Tex. Nov. 17, 2004)
  - Elektra Entertainment Group v. Does 1-6, Civil Action No. 1241 (E.D. Pa. October 13, 2004)

-
- BMG Music v. Does 1-203, Civil Action No. 04-650 (E.D. Pa. March 5, 2004) (reconsideration denied April 5, 2004)
- Interscope Records v. Does 1-25, Case No. 6:04-cv-197-Orl-22DAB (M.D. Fla. April 27, 2004)
- see also: Twentieth Century Fox Film Corp. et al v. Does 1-12 (N.D. Cal., Nov. 23, 2004) 3:04cv04862 (Movie studio case)

- **Arista v. Does 1-100 (GA)**
  - Motion of Public Citizen, EFF, ACLU, and ACLU Georgia to file as Amici Curiae in Support of Cox. [PDF 41k] *November 16, 2004*
  - Amicus Brief [PDF 89k] *November 16, 2004*
    - Exhibits A-E. [PDF 706kl *November 16, 2004*
  - COX Motion to Quash [PDF 45k] *November 15, 2004*
  - Cox Memorandum in Support [PDF 511k] *November 15, 2004*
    - Exhibit A [PDF136k] *November 15, 2004*
    - Exhibit B [PDF 716k] *November 15, 2004*
    - Exhibit C [PDF 214k] *November 15, 2004*
    - Exhibit D [PDF 111k] *November 15, 2004*
    - Exhibit E [PDF 678k] *November 15, 2004*
    - Exhibit F [PDF 68k] *November 15, 2004*
  - Complaint against Does 1-100 [PDF 2.6M] *August 25, 2004*
- Order denying Cox's Motion to Quash [PDF, 48K] February 1, 2005

- **Capitol Records v. Doe (FL - Orlando)**
  - Notice of Hearing (PDF 210k). May 19, 2004

- **BMG Music v. Does 1-3 (PA - Drexel)**
  - Plaintiff's Opposition to Motion for Leave to File (PDF 2.7M). April 29, 2004
  - Amicus Brief Regarding Plaintiffs' Request For Expedited Discovery (PDF 216k). April 8, 2004
  - Motion for Leave to File Amicus Brief (PDF 112k). April 8, 2004
  - Exhibits A-D (PDF 9.7M). April 8, 2004
  - Proposed Order for Motion for Leave to File (PDF 70k). April 8, 2004

- **Virgin Records America v. Does 1-9 (PA)**
  - Judge's Order regarding Discovery (PDF 29k). May 13, 2004
  - Plaintiff's Opposition to Motion for Leave to File (PDF 2.7M). April 29, 2004
  - Amicus Brief Regarding Plaintiffs' Request For Expedited Discovery (PDF 217k). April 8, 2004
  - Notice of Motion for Leave to File Amicus Brief (PDF 112k). April 8, 2004
  - Proposed Order for Motion for Leave to File (PDF 14k). April 8, 2004

- **Priority Records v. Does 1-8 (CA)**
  - Plaintiffs' voluntary dismissal [PDF 29k] *September 3, 2004*
  - Plaintiffs' Opposition to EFF Amicus (PDF 127k). July 2, 2004
  - Declaration of Whitehead in Opposition to EFF Amicus (PDF 36k). July 2, 2004

- Plaintiffs' Request for Judicial Notice (Pdf 33k). July 2, 2004.
- Report to and Request of the Assignment Committee (PDF 29k). April 8, 2004
- Order Denying Immediate Discovery (PDF 25k). April 8, 2004
- Supplemental Request for Judicial Notice (PDF 43k). April 5, 2004
- Notice of Motion for Leave to File Amicus Brief (PDF 7k). April 2, 2004
- Motion for Leave to File Amicus Brief (PDF 14k). April 2, 2004
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  - Middle District order adopting magistrate's report & recommendations (PDF 82k). April 29, 2004
  - Order Denying Expedited Discovery and Ordering Severance (PDF 1.8M). April 1, 2004
  - Plaintiffs' Response to Order to Show Cause (PDF 1.9M). March 16, 2004
  - Order to Show Cause on Ruling on Motion (PDF 234k). March 5, 2004
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  - Declaration of Jonathan Whitehead in Support of Motion (PDF 3.7M). March 23, 2004
  - Memorandum in Support of Motion (PDF 890). March 23, 2004

- Proposed Order Granting Motion (PDF 32k). March 23, 2004

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  - Order Granting Expedited Discovery and to File Amici Curiae Brief (PDF 108k). March 3, 2004
  - Amici's Motion for Leave to File Memorandum re Discovery Motion (PDF 21k). February 24, 2004
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  - Plaintiff's Response to Doe Motions (PDF 4.7M). May 3, 2004
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- **Capital Records v. Does 1-250 (NY - Time Warner Cable)**
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    - Complaint Exhibit A (PDF 2.5M). January 21, 2004
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        - RIAA Response to Amici (PDF 831k). February 13, 2004
        - Exhibit A (PDF 85k). February 13, 2004
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International

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- Check to see if your information has been subpoenaed.
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- Sample Recording Industry Complaint Against an Individual (PDF 13.2MB)
- Sony Music v. Michele Scimeca
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  - Counter Claim. February 4, 2004
- Sony Music v. Maalouf
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- Fonovisa v. Ross Plank
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- Parental liability memo by the students of the Berkman Center at Harvard Law School [Pdf 68k]
- Bankruptcy memo by EFF staff attorney Fred von Lohmann [PDF 52k]

RIAA Subpoenas

- Brownback Bill
  - Brownback Wall Street Journal Editorial (PDF 344k - October 7, 2003)
  - Letter in Support of Senator Brownback (September 18, 2003)

- Statement of Senator Brownback (PDF 88k - September 16, 2003)

- RIAA v. Verizon
- RIAA v. MIT
  - Order to Quash (PDF 28k)
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  - RIAA Oposition to MIT Motion (PDF 943k)
  - MIT Motion to Quash (PDF 358k)
  - RIAA Repsonse to MIT (PDF 245k)
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  - Jane Doe Challenge (PDF 2.9M)
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  - BC Motion to Quash (PDF 46k)
  - Memorandum of BC (PDF 321k)
  - RIAA Repsonse to BC (PDF 230k)
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  (N.D. Cal.)
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- Proposed Order Granting Application for Leave to File Brief (PDF 98k - *November 13, 2003*)

- Motion of AOL Time Warner for Leave to File Amicus Brief (PDF 988 k - *October 10, 2003*)
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- RIAA's Opposition to PBIS's Objections (PDF 159k - *November 7, 2003*)
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- Pacific Bell Complaint (PDF 1MB)
  - Exhibit 1 (PDF 266k)
  - Exhibit 2 (PDF 126k)
  - Exhibit 3 (PDF 3.9MB)
  - Exhibit 4 (PDF 108k)
  - Exhibit 5 (PDF 270k)
  - Exhibit 6 (PDF 239k)
  - Exhibit 7 (PDF 234k)
  - Exhibit 8 (PDF 78k)
- RIAA Motion to Dismiss (PDF 152k)
- Titan Motion to Dismiss (PDF 300k)
- MediaSentry Motion to Dismiss (PDF 180k)
- SBC/Pacific Bell Motion for Summary Judgment (on Article III grounds) (PDF 244k)

(D.D.C.)

- RIAA Motion to Enforce Subpoena (PDF 1.5MB)
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- Jane Doe v. RIAA
  - Doe's Reply in Further Support of Motion to Stay (PDF 181k)
  - Doe Motion to Intervene (PDF)
  - Ballard Declaration (PDF)
  - Offer of Proof (PDF)
  - RIAA opposition (PDF 544k) to staying enforcement of subpoena with attachments:
    - Text of Proposed Order (PDF 13k)
    - Declaration of Jonathan Whitehead in Support (PDF 535k)
    - Exhibit A to Whitehead Declaration (PDF 2.2MB)
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    - Exhibit C to Whitehead Declaration (PDF 69k)
    - Exhibit D to Whitehead Declaration (PDF 155k)
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  - ISPs' Brief in Support of Charter (PDF 1.3M - *January 26, 2004*)
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  - Charter Memorandum in Support of Motion for Protective Order (PDF 820k)
  - RIAA Memorandum in Opposition to Charter's Motion for Protective Order (PDF 606k)
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- Motion to quash denied without written opinion
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- Petition for Rehearing *February 18, 2005*

- In Re Subpoena to University of North Carolina, Chapel Hill
  - John Doe Motion to Quash Subpoena Issued by RIAA to UNC (PDF 161k - *November 21, 2003*)
  - ACLU's reply brief in support of John Doe's Motion to Quash (PDF 789k - *December 31, 2003*)
- In re Subpoena to North Carolina State University

  - Jane Doe Amended Motion to Quash Subpoena by RIAA to NC State (PDF)
- Model Motion to Quash 512(h) Subpoena (written before RIAA v. Verizon ruling. PDF 4.8M)

Lawsuit Against RIAA Amnesty Program

- Parke v. RIAA ("No Clean Slate lawsuit")
  - Complaint (PDF 400k). September 9, 2003.

Letter of 95 organizations to Senate committees regarding privacy implications of the DMCA subpoenas

- Senator John McCain - Senate Commerce, Science and Transportation Committee (PDF)
- Senator Leahy - Senate Judiciary Committee (PDF)
- Senator Coleman - Permanent Subcommittee on Investigations & Senate Committee on Governmental Affairs (PDF)
- Senator Hatch - Senate Judiciary Committee (PDF)
- Senator Levin - Permanent Subcommittee on Investigations & Senate Committee on Governmental Affairs (PDF)
- Senator Hollings - Senate Commerce & Science and Transportation Committee (PDF)

Media Releases

- July 25, 2003 File Sharers: See If the Recording Industry Is After You

- July 18, 2003 Electronic Frontier Foundation Launches File Sharing Ads
- July 7, 2003, Misguided "Anti-Piracy" Bill Introduced in Congress
- June 30, 2003, Electronic Frontier Foundation "Let the Music Play" Campaign

Other Resources

- August 14, 2003 letter from RIAA to Senator Coleman. (PDF 421k)
- August 11, 2003 letter from NetCoalition (an industry coalition of Internet companies) to the RIAA asking questions regarding the RIAA subpoena and litigation campaign. (Download PDF 93k)
- The RIAA lawsuit process explained on EFF Cooperating Attorney Charles Mudd's webpage.

Exhibit D

**http://www.iht.com/articles/
2006/07/13/yourmoney/music.php
(last visited July 24, 2006)**

Music deal voided by EU court
By Doreen Carvajal International Herald Tribune
Published: July 13, 2006

PARIS A European Union court on Thursday tossed out the approval of the two-year-old merger that created Sony BMG and had blunt criticism for the regulators that endorsed the union.

For the first time in its history, the European Court of First Instance in Luxembourg entirely voided the approval of a company combination, plunging the music industry into confusion and casting a chill over the prospects for another alliance, between Warner Music and EMI Group.

Shareholders reacted with alarm on Thursday. Warner's shares fell $5.23, or 17.6 percent, to $24.53 in New York while EMI Group's shares fell 28.25 pence, or 9.2 percent, to close at 277.75 pence, or $5.12, in London.

But legal experts specializing in antitrust issues considered the ruling particularly startling because it could potentially unwind the combined Sony BMG. European Commission antitrust regulators will now renew their scrutiny of the Sony BMG combination, a joint venture between the German media group Bertelsmann and Sony, the Japanese electronics giant.

In its ruling, the court in Luxembourg heaped scorn on the work of commission regulators, criticizing parts of their review for "an extremely cursory examination," inadequate reasoning and superficial observation on the market dominance of the combined company.

Essentially, the court concluded that the commission had failed to demonstrate that a combined Sony BMG would not be in a position to stifle competition in the music industry.

"What this decision is doing is opening the doors for the commission to be tougher," said Chris Bright, an antitrust consultant to the law firm Shearman & Sterling in London. "In general terms, it means that the commission is going to be emboldened to intervene in these deals and probably over a period of time they will become more interventionist."

The immediate reaction from the music companies came in choreographed and terse statements. "Today's judgment does not affect the validity of the Sony BMG joint venture," insisted the parent companies in the combination, Bertelsmann and Sony, which added in their joint statement

* * *

Exhibit E

http://en.wikipedia.org/wiki/World_music_market (last visited July 24, 2006)

World music market

From Wikipedia, the free encyclopedia

The world music market is the global market for the commercial trade of music. As of 2006, this market is dominated by the "Big Four record labels": Universal Music Group, Sony BMG Music Entertainment, EMI Group, and Warner Music Group. These companies control around 70% of the world music market and around 85% of the United States music market, demonstrating the concept of oligopoly within the music industry. On 13 July the EU annulled the merger of Sony Music and BMG and declared that Sony BMG must demerge Sony Music and BMG into separate entities once again.

Contents

- 1 Terminology and business structure
- 2 Reported statistics
  - 2.1 Albums sales and market value
  - 2.2 Singles sales
  - 2.3 Recorded Music Interim Physical Retail Sales in 2005
  - 2.4 Miscellaneous
- 3 References
- 4 See also
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Terminology and business structure

The term "record label" when referring to the Big Four is a misnomer, as they are actually corporate umbrella organizations called *business groups. A music group* is a business group consisting of music related companies, and is typically owned by an international conglomerate *holding company,* which often has non-music divisions as well. A music group controls and consists of music publishing companies, record (sound recording) manufacturers, record distributors, and *record labels. A* record label is a company that manages sound recording-related brands and trademarks (both of which are also called labels); coordinates the production, marketing, licensing, and copyright protection of sound recordings and videos; and maintains contracts with recording artists and their managers. Record companies (manufacturers, distributors, and labels) may also comprise a *record group* which is, in turn, controlled by a music group.

Record companies and music publishers that are not under the control of the Big Four are generally considered to be *independent,* even if they are large corporations with complex structures. Some prefer to use the term *indie label* to refer to only those independent labels that adhere to an arbitrary, ill-defined criteria of corporate structure and size, and some consider an indie label to be almost any label that releases non-mainstream music, regardless of its corporate structure.

Reported statistics

Nielsen Soundscan reported that the big four accounted for 81.87% of the world music market in 2005:[1]

- Universal Music Group (France/USA based) — 31.71%
- Sony BMG Music Entertainment (Japan/Germany based) — 25.61% (13.83% Sony, 11.78% BMG)
- Warner Music Group (USA based) — 15%
- EMI Group (UK based) — 9.55%
- independent labels — 18.13%

and in 2004, 82.64%:

- Universal Music Group — 29.59%
- Sony BMG — 28.46% (13.26% Sony, 15.20% BMG)
- Warner Music Group — 14.68%
- EMI Group — 9.91%
- independent labels — 17.36%

The global market was estimated at $30-40 billion in 2004.[2] Total annual unit sales (CDs, music videos, mp3s) in 2004 were 3 billion.

According to an IFPI report published in August 2005,[3] the big four accounted for 71.7% of retail music sales:

- Universal Music Group — 25.5%
- Sony BMG Music Entertainment — 21.5%
- EMI Group — 13.4%

- Warner Music Group — 11.3%
- independent labels — 28.4%

Prior to December 1998, the industry was dominated by the "Big Six": Sony Music and BMG had not yet merged, and PolyGram had not yet been absorbed into Universal Music Group. After the PolyGram-Universal merger, the 1998 market shares reflected a "Big Five", commanding 77.4% of the market, as follows, according to MEI World Report 2000:

- Universal Music Group including PolyGram — 21.1%
- Sony Music — 17.4%
- EMI — 14.1%
- Warner Music Group — 13.4%
- BMG — 11.4%
- independent labels — 22.6%

In 1918, worldwide sales of phonograph/gramophone records were estimated at 100 million units.

Albums sales and market value

The following table shows album sales and market value in the world in the 1990s-2000s,

N	Country	Album Sales Share	Share of World Market
1	USA	37-40%	30-35%
	EU	30-32%	31-34%
2	Japan	9-12%	16-19%

N	Country	Album Sales Share	Share of World Market
3	UK	7-9%	6.4-9.1%
4	Germany	7-8%	6.4-8.3%
5	France	4.5-5.5%	5.4-6.3%
6	Canada	2.6-3.3%	1.9-2.8%
7	Australia	1.5-1.8%	1.5-2.0%
8	Brazil	2.0-3.8%	1.1-3.1%
9	Italy	1.7-2.0%	1.5-2.0%
10	Spain	1.7-2.3%	1.4-1.8%
11	Netherlands	1.2-1.8%	1.3-1.8%
12	Mexico	2.1-4.6%	0.8-1.8%
13	Belgium	0.7-0.8%	0.8-1.2%
14	Switzerland	0.75-0.9%	0.8-1.1%
15	Austria	0.5-0.7%	0.8-1.0%
16	Sweden	0.7-0.9%	0.7-1.0%
17	Russia	2.0-2.9%	0.5-1.4%
18	Taiwan	0.9-1.6%	0.5-1.1%
19	Argentina	0.5-0.7%	0.5-1.0%
20	Denmark	0.45-0.65%	0.5-0.8%

Single sales

Physical single sales in the world in the 90s-00s and digital single sales in 2005.

N	Country	Physical Sales Share	Digital Sales Share in 2005
	EU	34-50%	13.2%
1	Japan	26-32%	1.7%
2	USA	4-25%	85%
3	UK	14,5-16%	6.3%
4	Germany	9-12%	5%
5	France	4-12.5%	1.9%
6	Australia	1.8-4.6%	0.48%
7	Netherlands	1.3-1.7%	<0.2%
8	Belgium	0.8-1.8%	<0.2%
9	Sweden	0.6-0.96%	<0.2%
10	Switzerland	0.5-0.92%	<0.2%
11	Austria	0.58-0.82%	<0.2%
12	Italy	0.3-1.0%	<0.2%
13	Spain	0.3-0.7%	<0.2%
14	Norway	0.3-0.47%	<0.2%
15	Ireland	0.2-0.5%	<0.2%
16	Canada	0.1-0.6%	<0.2%

N	Country	Physical Sales Share	Digital Sales Share in 2005
17	Portugal	0.01-1.0%	<0.2%
18	RSA	0.02-0.45%	<0.1%
19	New Zealand	0.19-0.29%	<0.1%
20	Denmark	0.10-0.25%	<0.1%

Recorded Music Interim Physical Retail Sales in 2005

all figures in millions

		UNITS				VALUE		CHANGE	
		Singles	CD	DVD	Total Units	$US	Local Currency	Units	Value
1	USA	3.3	300.5	11.6	326.8	4783.2	4783.2	-5.70%	-5.30%
2	Japan	28.5	93.7	8.5	113.5	2258.2	239759	-6.90%	-9.20%
3	UK	13.3	66.8	2.9	74.8	1248.5	666.7	-1.70%	-4.00%
4	Germany	8.5	58.7	4.4	71	887.7	689.7	-7.70%	-5.80%
5	France	11.5	47.3	4.5	56.9	861.1	669.1	7.50%	-2.70%
6	Italy	0.5	14.7	0.7	17	278	216	-8.40%	-12.30%
7	Canada	0.1	20.8	1.5	22.3	262.9	325	0.70%	-4.60%
8	Australia	3.6	14.5	1.5	17.2	259.6	335.9	-22.90%	-11.80%

		UNITS				VALUE		CHANGE	
		Singles	CD	DVD	Total Units	$US	Local Currency	Units	Value
9	Spain	1	17.5	1.1	19.1	231.6	180	-13.40%	-15.70%
10	Netherlands	1.2	8.7	1.9	11.1	190.3	147.9	-31.30%	-19.80%
11	Russia	-	25.5	0.1	42.7	187.9	5234.7	-9.40%	21.20%
12	Mexico	0.1	33.4	0.8	34.6	187.9	2082.3	44.00%	21.50%
13	Brazil	0.01	17.6	2.4	24	151.7	390.3	-20.40%	-16.50%
14	Austria	0.6	4.5	0.2	5	120.5	93.6	-1.50%	-9.60%
15	Switzerland**	0.8	7.1	0.2	7.8	115.8	139.2	n/a	n/a
16	Belgium	1.4	6.7	0.5	7.7	115.4	89.7	-13.80%	-8.90%
17	Norway	0.3	4.5	0.1	4.8	103.4	655.6	-19.70%	-10.40%
18	Sweden	0.6	6.6	0.2	7.2	98.5	701.1	-29.00%	-20.30%
19	India	-	10.9	-	55.3	79.2	3456.6	-19.20%	-2.40%

		UNITS				VALUE		CHANGE	
		Singles	CD	DVD	Total Units	$US	Local Currency	Units	Value
20	Denmark	0.1	4	0.1	4.2	73.1	423.5	3.70%	-4.20%
	Top 20	**74.5**	**757.1**	**42.8**	**915.2**	**12378.7**		**-6.60%**	**-6.30%**

Miscellaneous

In its June 30, 2000 annual report filed with the SEC, Seagram reported that Universal Music Group was responsible for 40% of worldwide classical music sales over the preceding year.[4]

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2. ^According to the RIAA (http://www.riaa.com/news/marketingdata/default.asp) the world music market is estimated at $40 billion, but according to IFPI (http://www.ifpi.org/site-content/statistics/worldsales.html) (2004) it is estimated at $32 billion.
3. ^http://www.ifpi.org/site-content/publications/rin_order.html
4. ^http://www.secinfo.com/dsvr4.58n4.htm#445

See also

- List of record labels and Category:Record labels
- Best selling music artists - World's top-selling music artists chart.

External links

- http://www.move.de/amm/ECON.htm - CD-Markets size in 1996

- http://www.zobbel.de/ - World records sales in years 1994/95/97/98.
- http://www.ifpi.org/site-content/publications/rin_order.html - 2005 Market Share
- http://www.HitQuarters.com - World Top 20 A&R Chart

Retrieved from "http://en.wikipedia.org/wiki/World_music_market"

Categories: Current events | Music industry

Exhibit F

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

Case Number: 04 - 16396
Ch: 11

[Dated November 30, 2004]

In Re: Panorama Records, Inc.)
)

Proceeding Memorandum/Order of Court - Test

MOVANT/APPLICANT/PARTIES:

#13 Motion of Zomba Enterprises and Zomba Songs for Relief from Automatic Stay
#16 Objection of Debtor

OUTCOME:

* * *

___ DECISION SET OUT MORE FULLY BY COURT AS FOLLOWS:

The Court modified the automatic stay to permit relitigation of the judgment and/or assessment of damages. The Court ordered that the movant take no further collection action outside of this Chapter 11 case. The Court directed the Debtor to file the appropriate employment pleadings within one week. Atty. Warnock agreed that no action will be taken in

the Superior Court until successor counsel enters an appearance.

IT IS SO NOTED:

_____
Courtroom Deputy

IT IS SO ORDERED:

/s/
Joan N. Feeney, U.S. Bankruptcy Judge

Dated: 11/30/2004

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-5016 and 06-5266

[Filed _____]

Panorama Records, Inc.	)
Appellant	)
	)
v.	)
	)
Zomba Enterprises, Inc. et. al.	)
Appellee	)
	)

MOTION FOR CONTINUANCE

Appellant Panorama Records, Inc. (hereinafter "Appellant") hereby submits the following Motion for a Continuance of the August 16, 2006, deadline to respond to Appellee Zomba's Motion to Oppose Judicial Notice (hereinafter "Appellee"). Appellant avers as follows:

1. On or about August 10, 2006, Appellee filed their Opposition to Appellant's Motion to Take Judicial Notice.

2. Appellant's counsel received the Opposition to Appellant's Motion to Take Judicial Notice (hereinafter "Opposition Motion") on August 16, 2006.

3. Appellant's counsel has been unable to get in contact with Appellee's counsel. Appellee's counsel has neither assented to or denied this extension.

4. Appellant's counsel contacted the 6th Circuit when they received the Opposition Motion. The Court orally agreed to a two (2) day extension to answer the Opposition Motion.

5. Appellant moves for a two (2) day extension, until August 18, 2006, to answer the Opposition Motion.

Respectfully submitted,

LAWRENCE E. FELDMAN & ASSOC.

BY: /s/
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Laurindo Santos, Panorama

* * *

APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 06-5016 and 06-5266

[Filed August 21, 2006]

Panorama Records, Inc. Appellant	)
v.	)
Zomba Enterprises, Inc. et. al. Appellee	)

APPELLANT's REPLY TO OPPOSITION TO MOTION TO TAKE JUDICIAL NOTICE OF CERTAIN FACTS PURSUANT TO FED. R. EVID. 201

Appellant Panorama Records, Inc. ("Panorama") hereby respectfully submits this reply to Appellee Zomba's opposition to Panorama's Motion To Take Judicial Notice of Certain Facts Pursuant to Fed. R. Evid. 201:

I. Fed..R. Evid. Rule 201 Mandates Judicial Notice

Federal Rule of Evidence 201 supports Panorama's position in several respects. First, the scope of Rule 201 is that it only applies to "adjudicative facts", so to the extent that any facts proferred by Panorama are "legislative facts,"[1] the court is free to adopt them apart from rule 201. The five internet articles attesting to news reports of Sony BMG's recording market share, BMG's music publishing market share, and a published article disclosing that the Sony BMG merger was ordered undone in Europe during the pendency of the briefing of this appeal (respectively exhibits "A," "B," "C," "D," and "E") are legislative in nature - i.e. they are not limited to the factual matters between the parties, but involve ongoing news not subject to reasonable dispute, and indeed. Zomba does not seriously dispute the accuracy of any of the facts proffered, just their relevance.

Second, as to the other submissions regarding adjudicative facts (the six simultaneous law suits assigned to Judge Campbell, and the bankruptcy order regarding relief from stay), Rule 201 provides the court shall take judicial notice if requested by a party and supplied with the "*necessary information*," the rule

---

[1] "Legislative facts," which are facts of general "relevance to legal reasoning and the lawmaking process" [Fed. R. Evid. 201[a] Advisory Committee's note] or are "established truths, facts or pronouncements that do not change from case to case" and "do not relate specifically to the ... litigants." *United States v. Gould*, 536 F.2d 216, 220 [8th Cir. 1976].

does not require admissible evidence (indeed the concept of judicial notice itself is intended to alleviate the evidentiary burden). Moreover, under Rule 201 the court may take judicial notice, whether requested or not, on its own discretion.

Third, since Rule 201 (f) expressly provides that "Judicial notice may be taken at any stage of the proceeding," Zomba's assertion that this court is somehow limited to the record that was available to the district judge who granted summary judgement, while at the same time admitting that this court has *de novo* review powers, is inexplicable. After all, F. R. Evid. 102 provides "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

II. Panorama's Request for Judicial Notice Is Supportable as Legislative Judicial Notice

Contrary to Zomba's assertion, the controlling principles are not contained in Federal Rule of App. Pro. 10, but in Federal Rules of Evidence 101, 201 and federal common law regarding legislative judicial notice. Federal Rule 101 provides that these rules shall apply in all federal courts, including courts of appeal. Under Fed. R. Evid. 201[f], judicial notice of *adjudicative facts* may be taken at any stage of the proceedings, including on appeal. In practice, appellate courts frequently take judicial notice of both adjudicative and *legislative facts* presented for the first time on appeal, whether requested by a party or on

their own initiative. See, e.g., *Hotel Employees & Rest. Employees Union, Local 100 of New York, N. Y. & Vicinity, AFL-CIO v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 540 n.1 [2d Cir. 2002]; *In re Indian Palms Assoc. Ltd.*, 61 F.3d 197, 205 [3d Cir. 1995].

In general, courts are free to take notice of legislative facts, including research data and writings like those cited in the famous "Brandeis brief."[2] Appellate courts are understandably more willing to take judicial notice of such legislative facts, because they help them develop reasonable rules of law that will apply in future cases. Legislative facts, while general in nature, often play a pivotal role in resolving the specific dispute before the court. In *Roe v. Wade*, 410 US. 113, 149 n.44, 163 [1973], for example, the "medical fact" that, during the first trimester, mortality from live birth is as great or greater than mortality from abortion, was critical in determining the constitutionality of abortion restrictions in that

---

[2] In 1907, Louis D. Brandeis represented the state of Oregon in Muller v. Oregon (208 US 412), a case before the US Supreme Court that involved the constitutionality of limiting hours for female laundry workers. To support his argument that overwork was inimical to the workers' health, Brandeis (with the help of his sister-in-law) compiled a number of statistics from medical and sociological journals and listed citations to the articles in his brief. The brief was significant in that it was the first one submitted to the Supreme Court that relied primarily on extra-legal data to prove its argument. Not only did the brief help Brandeis win the case but it also became a legal landmark in its own right. Briefs that cited non-legal data quickly became commonplace and became known as "Brandeis briefs."

case. In obscenity cases, judicially noticed "contemporary community standards"-often based on the judge's personal experience in the community-are frequently dispositive. See, e.g., *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132, 137 [2d Cir. 1983].

Appellate courts often take judicial notice of facts that were not available to litigants at trial and events that occurred after judgment was entered. For example, courts have taken judicial notice of guilty pleas entered in a related criminal case after judgment in the civil case was entered. See, e.g., *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 [4th Cir. 1989]. Similarly, appellate courts have taken judicial notice of post-judgment changes in the conditions in a foreign country relevant to an immigration appeal, *Ivezaj v. INS*, 84 F.3d 215, 218 - 19 [6th Cir. 1996], as well as post-trial changes in the racial composition of a state's judiciary in a discrimination suit. *Southern Christian Leadership Conference of Alabama v. Sessions*, 56 F.3d 1281, 1288 n.13 [11th Cir. 1995]. Appellate courts are also likely to take judicial notice of facts that affect the court's jurisdiction, indicating, for example, that the appeal may have become moot. *ITT Rayonier Inc. v. U.S.*, 651 F.2d 343, 345 n.2 [5th Cir, 1981].

Certain categories of facts have long been the subject of judicial notice on appeal. Courts routinely take judicial notice of pleadings, records and judgments in other court cases [see, e.g., *Green v. Warden, US. Penitentiary*, 699 F.2d 364, 369 [7th Cir. 1983]; *E.I. du Pont de Nemours & Co. Inc. v. Cullen*, 791 F.2d 5, 7 [1st Cir. 1986]] and in administrative agency proceedings [see, e.g., Opeka v. INS, 194 F.3d

392, 394-95 [7th Cir. 1996]. Courts are generally willing to take judicial notice of data, pronouncements and publications issued by the government, such as Environmental Protection Agency research [*Nebraska v. EPA*, 331 F.3d 995, 998 n.3 [D.C. Cir. 2003]]; State Department travel warnings [*Parsons v. United Tech. Corp.*, 700 A.2d 655, 665 n.18 [Conn. 1997]]; and a federal fisheries management plan approved by formal rule [*City of Charleston v. A Fisherman's Best Inc.*, 310 F.3d 155, 172 [4th Cir. 2002], cert. denied, 123 S.Ct. [2003]]. Appellate courts are also likely to take judicial notice of relevant newspaper articles [see, e.g., *The Washington Post v. Robinson*, 935 F.2d 282, 291-92 [D.C. Cir. 1991]] and historical information contained in authoritative publications, such as a text on the history of Lincoln Center [see, e.g., *Hotel Employees*, 311 F.3d at 540 n.1.].

Appellate courts have increasingly cited information found on the Internet. As with hard-copy publications, courts are most willing to take judicial notice of information found on government Web sites, such as the time of sunrise found on the Web site of the U.S. Naval Observatory [*US. v. Bewaldi*, 226 F.3d 1256, 1266 n.9 [11th Cir. 2000]]; the prime interest rate on the Federal Reserve Board Web site [*Levan v. Capital Cities/ABC Inc.*, 190 F.3d 1230, 1235 n.12 [11th Cir. 1999]]; and records of retired military personnel on a federal Web site [Denius, 330 F.3d at 926].

Courts have, however, also been willing to take judicial notice of information on arguably less reliable commercial Internet sites, including mileage information on Mapquest [*In re Extradition of*

Gonzalez, 52 F. Supp. 2d 725, 731 n.12 [W.D. La. 1999]]; historical information on Liberia on the "Geocities" Web site [*Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 278 n.2 [S.D.N.Y. 1999]]; and information regarding a bank's ownership from the bank's Web site [see *Laborers' Pension Fund v. Blackmore Sewer Constr. Inc.*, 298 F.3d 600, 607 [7th Cir. 2002]. The court here can easily verify the truth or accuracy of Panorama's submissions with a simple internet "google search" of its own.

III. The Issue of Potential Copyright Misuse Is Not New, as it Was Disclosed or Discussed in the Joint Appendix, and Implicated in Plaintiff Zomba's Disclosure of Corporate Affiliations.

Zomba feigns surprise at this copyright misuse issue, but the Joint appendix indicates several references anticompetitive behavior and Zomba's belief that it can commit such conduct in the form of refusing to license and filing multiple lawsuits against other similarly situated karaoke manufacturers:

a) The assignment of at least six related copyright infringement cases filed by Zomba against karaoke manufacturers seeking huge statutory damages and injunction, which were all assigned to the same judge as in the instant case, Judge Campbell. JA at 547-548.

b) Zomba's untenable position that it can withhold a license from any karaoke company it chooses, thus making it impossible to produce karaoke CD+G's of its published songs without its

approval. [See Brief of Appellees, p. 17]; JA, [R. 83, Leak Deposition, p, 68, JA 590].

c) Panorama complaining about the refusal of Zomba to negotiate a license in good faith in connection with the court's consent order providing for an injunction pendente lite and pending license negotiations. JA 304, Panorama's Response to Plaintiffs' Motion for Sanctions.

d) The consent order entered by the district court, which referenced completion of license negotiations in connection with Panorama's use, which Plaintiff claimed were not entered into in good faith. JA. 202, Consent Order.

e) Zomba's admitted refusal to negotiate with certain karaoke companies JA. 654, Howard Deposition.

In its response, Zomba notified this Court of its corporate affiliation with the BMG Music Group.

Based upon this filing, Panorama researched BMG on the internet and found the following internet articles, which contain matters that are relevant to the issue of whether there is a public policy implicated in Panorama's claim that it is a victim of an illegal extension of Zomba's copyright monopoly into the field of karaoke. Most involve circumstances that occurred after commencement of suit, and some after trial, such as: a) Sony-BMG's market share of the market for music recordings is 21.5% as a result of the August 5, 2004. merger between these companies; b) that in July,

2006, this merger was voided by a European Union court as being anticompetitive and not in the consumer's best interest, and; 3) that BMG Music Publishing is third largest music publisher in the world. Surely an ongoing anti-competitive attempt to extend the copyright monopoly from music publishing and records into Karaoke, which Panorama claims, (despite the disability of its Chapter 11 and not being represented by counsel during much of the proceedings,) is relevant to the issue of the appropriateness and fairness and constitutionality of the infringement award on appeal. Moreover, the fact that there is a large concerted government interest involved with these Zomba/BMG copyrights is relevant to Panorama's 8th amendment claim of an excessive fine at the hand of a government sponsored monopolist, since Zomba, as well as its affiliate Sony BMG is part of a trade group, the RIAA, which obtained an antitrust exemption in the copyright act amendments of 1996.[3]

Additionally, Panorama respectfully requests this Court to take judicial notice of the fact that on the same date it filed suit against Panorama for copyright infringement, Zomba filed six other lawsuits against

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[3] Copyright Act, 7 USC 114(e) (for RIAA antitrust exemption and authority to collect statutory royalties for others under the Copyright Act.) Zomba's admitted affiliation to BMG Music and RIAA member SONY BMG, is in and of itself relevant to whether there is sufficient government involvement in punishing Panorama for 8th amendment excessive fine analysis, at issue herein (in addition to relevance to copyright misuse, public policy concerns, or simply as a factor to consider in assessing a fair award.

other karaoke manufacturers for copyright infringement, all which were assigned to Hon. Judge Todd J. Campbell. This is relevant to the anti-competive nature of Zomba's licencing and their attempt to take over the industry, as well as supporting Panorama's claim that there was mass refusal to license. JA. At. 654.

Finally, Panorama respectfully requests this Court to take judicial notice of the Order of the Bankruptcy Court for the District of Massachusetts, Hon. Judge Feeney dated 11/30/2004 granting Relief from Stay. A copy of this Order is attached hereto as Exhibit F. This is an order regulating litigation between the parties to this appeal, as Panorama is currently in Chapter 11 proceedings. This is relevant to shaping relief herein, as this order provides relief from stay from the bankruptcy court for the purposes of ascertaining the amount of the award, but not allowing for entry of final judgment and execution without Bankruptcy court approval. This is also relevant to Panorama's position that the matter below should have been transferred to Massachusetts. Pursuant to 28 U.S.C. 1407.

Nowhere in its opposition papers does Zomba deny that these matters are true, and all are easily verifiable and not seriously controversial or controverted within the meaning of Federal Rule. 201, upon whose reliance Zomba is misplaced.

Dated: 8-18-6

Respectfully submitted,

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BY: /s/

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* * *

Supreme Court, U.S.
FILED
APR 9 - 2008
OFFICE OF THE CLERK

(2)

No. 07-1028

In The
Supreme Court of the United States

PANORAMA, INC.,

Petitioner,

v.

ZOMBA ENTERPRISES, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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April 9, 2008

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QUESTIONS PRESENTED

Whether the Sixth Circuit correctly held that the Eighth Amendment Excessive-Fines Clause does not apply to the District Court's award of statutory damages in this civil lawsuit in which the government is not a party.

Whether the Sixth Circuit correctly held that the District Court's statutory-damages award did not violate Petitioner's Fifth Amendment due-process rights because they were not wholly disproportionate to the offense or obviously unreasonable.

Whether the Copyright Clause, U.S. Const. art. I, § 8, cl. 8, requires a copyright holder to license its musical compositions to karaoke manufacturers.

Whether the Sixth Circuit correctly held that Petitioner's sale of karaoke discs does not fall within the "teaching" section of the Copyright Act's fair-use provision because Petitioner itself does not use the discs to "teach" lyrics.

Whether the Sixth Circuit correctly refused to take judicial notice of untimely, unauthenticated and inadmissible Internet articles Petitioner moved to add to the appellate record after Respondents filed their response brief in the Sixth Circuit.

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STATEMENT OF THE CASE

Although Petitioner, Panorama, Inc. ("Panorama"), portrays this case as one of "great importance," it is nothing more than a classic case of willful copyright infringement. The most remarkable aspect of this case is Panorama's repeated, unapologetic and willful infringement of twenty-six different copyrighted works of Respondents, Zomba Enterprises, Inc. and Zomba Songs, Inc. (collectively, "Zomba"), in violation of a federal district court order.

Only after the fact did Panorama conjure the defense of fair use, a defense that is inapplicable to Panorama's commercial, non-transformative and wholesale copying of Zomba's works. In light of the egregious nature of Panorama's conduct, the District Court awarded appropriate statutory damages against Panorama for each of the twenty-six infringed works within the boundaries Congress set in enacting the U.S. Copyright Act.

Panorama paints itself as a "victim" and suggests the lower court decisions in this case will impede "the Progress of Science and useful Arts." It is infringing conduct such as Panorama's conduct, however, that threatens to chill the creation of art by depriving copyright holders of compensation for their efforts.

The Sixth Circuit correctly followed the precedent of this Court in affirming the District Court's decision and created no circuit split in the process. To the contrary, the Ninth Circuit — the circuit court Panorama claims has rendered decisions conflicting with the Sixth Circuit decision here — earlier this year

followed the Sixth Circuit's decision in this very case in Leadsinger, Inc. v. BMG Music Publishing, 512 F.3d 522 (9th Cir. 2008), another karaoke case involving Zomba.

This case involves nothing more than the fair and usual application of the Copyright Act to remedy a willful infringement of a most egregious nature. Therefore, Panorama's petition should be denied.

I. The Underlying Allegations

In 1998, Panorama began manufacturing and selling karaoke discs containing recordings of musical compositions. (R. 100, Damages Hearing Tr. at 27:4). Panorama released karaoke products in a "CD+G" ("compact disc plus graphics") format, which contains a recording of a musical composition with the option of viewing a graphic representation of the lyrics of that composition in synchronization with the music when played on a karaoke machine. (R. 28, Summary Judgment Memo. at 2).

Since 1998, Panorama has released monthly karaoke discs in four genres: pop, R&B, rock and country. (R. 100, Damages Hearing Tr. 26:24-25-27:27). Each disc includes nine to ten recordings of copyrighted musical compositions. (Id. at 33:19-24).

Panorama did not seek permission from any copyright holders before releasing the infringing products. Thus, Panorama has released discs infringing thousands of musical-composition copyrights. (Id. at 33:19-24). Panorama exploited ten of Zomba's copyrighted musical compositions in 1999

and 2000 without Zomba's permission. (R. 28, Summary Judgment Memo. at 2; R. 71, Panorama's Resp. to Req. for Adm. Nos. 2, 41, 59, 65, 72, 77, 110, 122, 137, 143).

In late 2000, Nashville attorney Linda Edell Howard notified Panorama that the company was selling products containing the copyrighted works of Without Anna Music, another publishing company, without permission. (R. 100, Damages Hearing Tr. at 8:8-20). Although Panorama agreed to license terms for those other musical compositions, Panorama failed to comply with those terms. (Id. at 12:18-25).

While negotiating licenses with Ms. Howard in 2000, Panorama hired the former head of licensing at The Harry Fox Agency, Vincent Castalucci, to advise the company about licensing requirements for exploitation of copyrighted works on karaoke products. (Id. at 37:11-18).[1] Mr. Castalucci advised Panorama that licenses were required for karaoke products. (Id. at 38:12-21). Nevertheless, Panorama continued to exploit Zomba's musical compositions and continued to release new products without obtaining or even requesting Zomba's permission. (Id. at 38:22-39:2, 55:7-19).

Ms. Howard, acting on behalf of Zomba, sent Panorama "cease and desist" letters on February 28, 2002, and April 12, 2002, respectively. In those letters, Zomba requested that Panorama provide proof

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[1] The Harry Fox Agency is a licensing agent for musical-composition copyrights. (R. 100, Damages Hearing Tr. at 11:8-11).

of any licenses or permission obtained before exploiting the copyrights identified in the letters, provide a full accounting of all past exploitations and refrain from selling the infringing products. Ms. Howard also advised Panorama that its continued unlawful exploitation could lead to a finding of willful copyright infringement. (Id. at Exs. 1 & 2). Panorama never provided proof of permission or accountings and continued to exploit Zomba's copyrighted works. (Id. at 11:12-12:3).

After receiving Ms. Howard's letters and being advised by Mr. Castalucci that licenses were required, Panorama concluded that the license fees Ms. Howard proposed "were so high that Panorama would not be able to remain competitive in the karaoke industry." (R. 31, Affidavit of Laurindo Santos ¶¶ 8-9). Panorama then looked for a way to avoid paying the copyright holders for permission to use the protected works. (Id. at ¶ 9).

Mr. Santos, a Panorama shareholder and officer, decided how Panorama would proceed: "What am I going to do? I will try to stay in business and let them keep coming as they come. I will just pay them as they approach." (R. 71, Depo. of Laurindo Santos 99:3-16).

II. Procedural Background and Panorama's Post-Complaint Willful Infringement

A. Proceedings in the District Court

Zomba filed its Verified Complaint on January 13, 2003, in the United States District Court for the Middle District of Tennessee ("District Court"),

alleging thirty counts of copyright infringement.[2] (R. 1, Ver. Compl.). Panorama continued to sell the infringing products after this suit was filed. (R. 100, Ex. 3 to Damages Hearing Tr.).

In April 2003, Panorama agreed to a District Court Order prohibiting the sale of infringing products. (R. 13, Order). Within ***four days*** of the entry of that Order, however, Panorama resumed the sale of infringing products:

> Q: And in fact your records, Panorama's records show that after the April 22, 2003 injunction was entered, the company continued to sell products four days later, April 26, 2003 containing compositions that are the subject of this lawsuit; isn't that correct, Mr. Santos?
>
> A: If the records show that, it's got to be.

(R. 100, Damages Hearing Tr. at 46:9-14).

In fact, Mr. Santos could not confirm that he ever told his colleagues at Panorama to stop selling the infringing products after the District Court entered its April 22, 2003, Order. (Id. at 44:23-45:5). Panorama never returned to the District Court to seek relief from that Order or to advise the District Court that sales of the infringing products had resumed. (Id. at 44:3-7).

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[2] Zomba subsequently dismissed four counts. (R. 69, Motion for Voluntary Dismissal).

Panorama raised its fair-use defense for the first time fourteen months into the litigation of this case. (Id. at 49:3-18).

The parties filed opposing summary judgment motions with the District Court. Panorama moved on the sole ground that its exploitation of Zomba's copyrighted works constituted fair use. (R. 27 & 28, Panorama's Summary Judgment Motion and Memo). On June 18, 2004, the District Court granted summary judgment in Zomba's favor on the issue of infringement and rejected Panorama's fair-use defense. (R. 61, Memorandum).

Panorama continued to sell unlicensed products after entry of summary judgment and as late as November 2005, including at least one product that contains one of the musical compositions at issue in this case. (R. 100, Damages Hearing Tr. at 33:25-34:2, 55:1-47). In fact, Panorama unapologetically continues to manufacture and sell products containing performances of musical compositions the company has no permission to exploit. (Id. at 58:18-21).

After Zomba asked the District Court to hold Panorama in contempt for violating the District Court's April 2003 Order (R. 39, Motion for Sanctions), Panorama's counsel moved to withdraw. (R. 51, Motion to Withdraw). Panorama was given time to find successor counsel, but no lawyer entered an appearance on the company's behalf before the deadline established by the Court. (R. 54 & 56, Orders). Despite the deadlines set forth in the Scheduling Order, Panorama refused to cooperate with Zomba's counsel in the preparation of a Joint Pretrial

Order. (R. 68, Order). The District Court entered a default against Panorama on the issue of damages. (R. 68, Order).

Days before the damages hearing, Panorama filed for Chapter 11 bankruptcy protection, and the case was stayed. (R. 75, Notice of Bankruptcy). The Bankruptcy Court subsequently lifted the stay. (R. 89, Notice of Filing).

On November 5, 2005, the District Court held the damages hearing. (R. 100, Damages Hearing Tr.). On December 5, 2005, the District Court issued findings of fact and conclusions of law, concluding that Panorama's infringement was willful and awarding Zomba $31,000 for each of the twenty-six infringements at issue, for a total of $806,000. (R. 107, Findings of Fact and Conclusions of Law). The District Court awarded attorneys' fees in the amount of $76,456.16 and costs in the amount of $1,058.91. (R. 122, Order).

Panorama appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit. (R. 127, Notice of Appeal).

B. The Sixth Circuit Opinion

On June 26, 2007, the Sixth Circuit affirmed the District Court's judgment in all respects.

The Sixth Circuit first affirmed the District Court's rejection of Panorama's fair-use defense. Analyzing the four fair-use factors, the Sixth Circuit held:

1. Panorama's use of the works is "only minimally, if at all, transformative" and is commercial in nature;

2. The subject infringed works — musical compositions — "'fall[] within the core of the copyright's protective purposes'";

3. Panorama copied the compositions in their entirety; and

4. "Panorama's unlicensed copying deprived Zomba of licensing revenues it otherwise would have received."

(Opinion, Apx. 11a-17a (citations omitted)).

The Sixth Circuit also affirmed the District Court's finding of willful infringement, relying on the fact that Panorama continued the infringing activity after the District Court entered a consent decree forbidding Panorama to do so. (Opinion, Apx. 17a-20a).

Finally, the Sixth Circuit affirmed the District Court's award of statutory damages in the amount of $31,000 per infringed work. The Sixth Circuit held that the award was not an "excessive fine" under the Eighth Amendment because the Excessive-Fines Clause does not apply to money damages in a civil suit. The Sixth Circuit also held that the award did not violate Panorama's right to due process because the award was not sufficiently oppressive to constitute a deprivation of due process. (Opinion, Apx. 20a-26a).

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit — in a Decision Followed by the Ninth Circuit — Correctly Applied the Copyright Law and This Court's Precedent in Affirming the Decision of the District Court.

The Sixth Circuit correctly affirmed the District Court's conclusion that Panorama willfully infringed all twenty-six of the copyrights at issue. Panorama suggests the Sixth Circuit decision created a split with the Ninth Circuit, but the Ninth Circuit has since followed the Sixth Circuit's decision in another karaoke case. In rendering their decisions, both circuit courts applied the fair-use test set forth in the Copyright Act as applied by this Court in Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

The Sixth Circuit also correctly affirmed the District Court's exercise of its broad discretion in awarding statutory damages within the range established by Congress in Section 504 of the Copyright Act. Panorama's willful infringement of twenty-six of Zomba's copyrighted works in flagrant violation of a District Court Order and full awareness of its licensing obligations justifies the statutory-damages award of $31,000 per infringed work, an award at the lower end of the available heightened statutory damages for willful infringement.

A. The Sixth Circuit Correctly Affirmed the District Court's Conclusion That a Fair-Use Defense Is Inapplicable to Karaoke Recordings.

Although failing to assert such defense in its Answer to the Complaint, Panorama claimed more than one year after the Complaint was filed that its infringement is permitted as "fair use" pursuant to Section 107 of the Copyright Act, 17 U.S.C. § 107.[3] (R. 100, Damages Hearing Tr. at 47:9-18). The Sixth Circuit accurately described Panorama's late reliance on the fair-use defense as nothing more than a "post hoc rationalization concocted to skirt liability." (Opinion, Apx. 18a, n.9).

Section 107 provides four non-exclusive factors to consider when evaluating whether a use is fair:

> 1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> 2. The nature of the copyrighted work;

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[3] For the first time on appeal, Panorama also raised the defenses of *de minimis* use, misuse of copyright, compulsory license and violation of the idea/expression dichotomy. The Sixth Circuit correctly refused to entertain those arguments, holding that Panorama failed to raise them in the District Court. (Opinion, Apx. 10a, n.6). Panorama suggests the defenses should have been part of the fair-use analysis regardless of Panorama's failure to raise them below. The waived defenses, however, are each unique defenses not encompassed within the four fair-use factors set forth in the Copyright Act. See 17 U.S.C. § 107.

> 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> 4. The effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

These factors should not be "treated in isolation one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." Campbell, 510 U.S. at 578.

Panorama calls on this Court to use this case as a vehicle to refine the doctrine of fair use. This case is not the appropriate vehicle to do so, for this case is not even close. Even if Panorama had believed at the time that its use of Zomba's works was fair, such belief, as the Sixth Circuit held, was objectively unreasonable because Panorama had entered into a consent decree to cease its infringing conduct. (Opinion, Apx. 19a). Moreover, Panorama's wholesale misappropriation of the entirety of Zomba's compositions for purely commercial use weights all four fair-use factors heavily in Zomba's favor.

The Sixth Circuit did not, as Panorama asserts, give "dispositive weight" to the commercial nature of Panorama's use of the infringed compositions. (See Petition at 16). Instead, the Sixth Circuit correctly affirmed the District Court's conclusion that ***none*** of the four factors supports a finding of fair use.

1. **Panorama's Use of the Compositions Is Purely Commercial and Thus Presumptively Unfair.**

   a. The Sixth Circuit Followed *Campbell* in Determining That Panorama's Use Is Not Transformative or Commercial.

The first fair-use factor is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). The Sixth Circuit applied this Court's description of the first fair-use factor in Campbell, 510 U.S. at 579:

> The central purpose of this investigation [into purpose and character of use] is to see...whether the new work merely "supersede[s] the objects" of the original creation, or instead ***adds something new***, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."

(Opinion, Apx. 12a (quoting Campbell, 510 U.S. at 579) (emphasis added)). "'[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.'" Id.

Applying this standard, the Sixth Circuit determined that "Panorama's use of the compositions is only minimally, if at all, transformative." Id. The

Sixth Circuit noted Panorama's admission that the hired musicians did not "change the words or music." Id.

In fact, not only did Panorama not change the words or music, it aimed to create a copy as close to the original compositions as possible:

> Q: What instructions do you give the recording studio about the number of musicians or vocalists to use?
>
> A: None. Just make it a rendition of the track, and we wanted a good reproduction, a good version.
>
> Q: What do you mean by a — what constitutes a good version in your mind?
>
> A: Something that's recognizable if you — ***close to the original***.

(R. 71, Depo. of Laurindo Santos at 14:8-16 (emphasis added)).

Panorama argued for the first time to the Sixth Circuit that Panorama "transformed" the original compositions because its use of the compositions is specifically designed to teach the listeners to sing those songs, thus serving a different purpose than the original.

The Sixth Circuit correctly rejected this argument, distinguishing a karaoke use from the parody use that this Court concluded was fair in Campbell: "Unlike a

parody, a facsimile recording of a copyrighted composition adds nothing new to the original and accordingly has virtually no transformative value." (Opinion, Apx. 12a (emphasis added)). The Sixth Circuit found:

> Panorama's own description of karaoke further undermines its assertion regarding "teaching": "Karaoke is primarily thought of as a form of *entertainment* that allows anyone to grab a microphone, hop on stage, and live out their [sic] fantasies of performing as famous music stars.'"

(Opinion, Apx. 13a (quoting R. 208, Memo. in Supp. Def.'s Mot. for Summ. J. at 3) (emphasis in Sixth Circuit Opinion)). The Sixth Circuit also determined that the record lacked any evidence that Panorama's products are used for teaching. (Opinion, Apx. 13a).

Panorama argues that ***its*** use is fair because ***a purchaser*** of its products may use the recording for teaching purposes. Panorama offered no evidence and does not argue that ***it*** uses the recordings to teach anything to anyone. The Sixth Circuit correctly held that the end-user's use of the work is "largely irrelevant; instead, the focus is on whether [the] ***alleged infringer's use*** is transformative and/or commercial." (Opinion, Apx. 13a) (emphasis added).

The Sixth Circuit compared Panorama's conduct to that of the plaintiff in Princeton Univ. Press v. Mich. Doc. Servs., Inc., 99 F.3d 1381, 1385 (6th Cir. 1996) (en banc), cert. denied, 520 U.S. 1156 (1997). In Princeton Univ. Press, the Sixth Circuit rejected the fair-use

defense of a copy shop that copied books and sold the copies to students in "coursepacks," holding that the challenged use was that of the copy shop, not the students. Id. at 1386.

> [T]he use of the materials by the students is not the use that the publishers are challenging. What the publishers are challenging is the duplication of copyrighted materials for sale by a for-profit corporation that has decided to maximize its profits — and give itself a competitive edge over other copyshops — by declining to pay the royalties requested by the holders of the copyrights.

Id.

"Quite similarly," the Sixth Circuit held in the instant case, "Zomba does not challenge karaoke crooners' renditions (atrocious or otherwise) of the relevant compositions, but rather Panorama's decision to copy these songs onto CD+Gs and then distribute them without paying royalties." (Opinion, Apx. 14a).

The Sixth Circuit's analysis was correct. How a purchaser or user chooses to use the karaoke products is irrelevant. Panorama's unauthorized exploitation of the subject compositions for commercial gain is the only relevant conduct.

The Sixth Circuit's conclusion is corroborated by the decision of an Indiana district court in another karaoke case, Morganactive Songs v. K&M Fox, Inc., 77 U.S.P.Q.2d 1064 (S.D. Ind. 2005). The defendant in Morganactive argued that karaoke constitutes parody

and should be afforded a fair-use defense because of the use of bar patrons. The court rejected this argument, concluding:

> It is not the original work that is being criticized, rather it is the glory seeker who has usually been inspired by liquid courage to provide the vocals to an otherwise unchanged musical backdrop. This is not parody, but solely imitation. Nothing "new" has been created, which the Supreme Court found to be an important characteristic at the heart of fair use.

Id. at 1068 (citations omitted).

Finally, the Sixth Circuit correctly concluded that Panorama's copying of Zomba's compositions to sell for karaoke use is commercial in nature. (Opinion, Apx. 14a). This Court has held that purely commercial use is presumptively unfair. See Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984).[4]

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[4] Panorama argues that the lower courts erred by placing on Panorama the burden of proof as to this factor, asserting that this Court's holding in Campbell, 510 U.S. at 584, that commerciality is only one factor in the fair-use analysis contradicts this Court's holding in Sony Corp. of Am., 464 U.S. at 451. This Court in Campbell, however, ***affirmed*** its position in Sony, holding: "No 'presumption' or inference of market harm that might find support in Sony is applicable to a case involving something beyond ***mere duplication*** for commercial purposes." 510 U.S. at 591 (emphasis added). Put another way, if the copied work is "mere duplication" made for the infringer's commercial purpose, the court should presume market interference.

Accordingly, Panorama's use of Zomba's works is presumptively unfair under the first fair-use factor.

b. The Ninth Circuit Followed the Sixth Circuit's Decision.

Panorama argues that the Sixth Circuit created a split with the Ninth Circuit by establishing a "rigid rule" that analyzes fair-use claims "in a vacuum, rather than in the context of its effect on individuals and society . . . ." (Petition at 22). Not only are the Ninth Circuit cases on which Panorama relies distinguishable from the instant case, the Ninth Circuit recently followed the Sixth Circuit's decision here in another karaoke case.

The Ninth Circuit in Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007), and Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003), applied the Copyright Act fair-use factors, as this Court instructed in Campbell, to the facts of each specific case. Those cases do not address karaoke but instead the use of copyrighted images as "thumbnail" images for purposes of an Internet search engine. The Ninth Circuit held in both cases that the uses were fair primarily based on the transformative nature of the uses, which served the different function of improving access to information on the Internet versus artistic expression. See Perfect 10, Inc., 487 F.3d at 721; Kelly, 336 F.3d at 819. The Ninth Circuit also concluded that the search engine's uses of the images did not harm the photographer's market for the images.

This case, when evaluated on its unique facts, as Campbell requires, is distinguishable from the "thumbnail" cases. Panorama's uses were not transformative, as discussed above. Moreover, as discussed below in Section I.A.4., unlike in the "thumbnail" cases, Panorama's use harmed Zomba's market for its compositions.

Any doubt as to whether the Sixth Circuit's decision here created a split with the Ninth Circuit is eliminated by the recent Ninth Circuit decision in Leadsinger, Inc., 512 F.3d at 522. In Leadsinger, Inc., a declaratory judgment action filed against Zomba, among others, the Ninth Circuit followed the Sixth Circuit's decision here and rejected a karaoke manufacturer's fair-use defense.[5] The Ninth Circuit

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[5] The Ninth Circuit in Leadsinger, Inc. also criticized EMI Entm't World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1221-22 (D. Utah 2007), the only decision to hold that a karaoke device is not an audiovisual work and that synchronization licenses are not necessary to sell a product that displays lyrics in timed relation with music. The Ninth Circuit held that the court in EMI Entm't World failed to consider the use of song lyrics in context:

> The images of song lyrics for the purpose of karaoke differ from song lyrics printed on a sheet of paper. Song lyrics printed on paper are not a series of images, have no relationship to a machine, and are not capable of indicating to the consumer when the lyrics are to be sung. On the other hand, images of song lyrics embedded in a karaoke device are part of a series of images, and must be shown by a machine so that the consumer knows when to sing each lyric.

Leadsinger, Inc., 512 F.3d at 528, n.2.

held that all four fair-use factors weighed against a finding of fair use. Id. at 530-31. The Ninth Circuit rejected Leadsinger's argument that karaoke teaches singing, because "it is not reasonable to infer that teaching is actually the purpose of Leadsinger's use of the copyrighted lyrics." Id. at 530.

The two circuit courts to have considered the issue both agree that unlicensed karaoke use of third-party compositions is not fair. Both circuits' decisions are consistent with that of the decision in ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 64-66 (2d Cir. 1996), in which the Second Circuit held that song lyrics as used in karaoke enjoy independent copyright protection as literary works and that compulsory licenses under 17 U.S.C. § 115 do not give the defendants the right to publish the lyrics of the composition on a screen.[6] Accordingly, no circuit conflict exists that warrants resolution by this Court.

2. The Subject Musical Compositions "Fall within the Core of the Copyright's Protective Purposes."

The next fair-use factor is "the nature of the copyrighted work." 17 U.S.C. § 107(2). "This factor calls for recognition that some works are closer to the

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[6] Panorama argues that this Court should grant Panorama's Petition because the karaoke industry needs a decision affirming or overruling ABKCO Music, Inc. The Ninth Circuit's decision in Leadsinger, Inc. following the Sixth Circuit decision in this case answers any questions unequivocally: Members of the karaoke industry need a license from the owners of the compositions to use the compositions lawfully.

core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." Campbell, 510 U.S. at 586.

The Sixth Circuit held that, "like the musical composition in Campbell (Roy Orbison's 'Oh, Pretty Woman'), the compositions of pop songs here 'fall[] within the core of the copyright's protective purposes.'" (Opinion, Apx. 14a (quoting Campbell, 510 U.S. at 586)). Panorama does not appear to challenge this holding.

3. Panorama Admits It Used the Infringed Compositions in Their Entirety.

The third fair-use factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). The Sixth Circuit correctly affirmed the District Court's conclusion that this factor weighs against fair use. Panorama admits copying each of the subject compositions in its entirety. (R. 71, Depo. of Laurindo Santos at 14:8-16).

The lower courts both correctly found that this factor clearly weighs against a finding of fair use. See, e.g., Princeton Univ. Press, 99 F.3d at 1389 (citation omitted) (finding use of 5 to 30% of a copyrighted work to be enough to weigh against a finding of fair use); see also Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998) (noting that "generally, it may not constitute a fair use if the entire work is reproduced.") (citation omitted).

4. Panorama's Infringement "Deprived Zomba of Licensing Revenues It Otherwise Would Have Received."

The fourth fair-use factor is "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4).

The Sixth Circuit correctly affirmed the District Court's placing the burden of proof on Panorama as to this factor because the challenged use is commercial in nature. (Opinion, Apx. 15a). See Sony Corp. of Am., 464 U.S. at 451.

In support of the "market-harm" test, Panorama argued below that, because karaoke use is transformative, "it is less likely that it negatively affects the market for the original." As explained above, the Sixth Circuit correctly concluded that Panorama's copies are not transformative; they are simply copies.

Panorama also argued below that "Zomba and Panorama do not operate in the same market," but failed to cite any evidence supporting this claim. Indeed, the evidence is to the contrary, and the Sixth Circuit thus correctly rejected Panorama's claim as factually inaccurate:

> [T]he record illustrates that Zomba has previously licensed (and continues to license) its musical compositions to purveyors of karaoke products. It follows, then, that market harm is a given, as Panorama's unlicensed copying deprived Zomba of licensing revenues it

> otherwise would have received. Further, there can be no doubt that Panorama's practices, if they became widespread throughout the karaoke industry, would have a deleterious effect on the potential market for licenses to Zomba's songs.

(Opinion, Apx. 16a).

"To negate fair use, one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work.'" Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (quoting Sony Corp. of Am., 464 U.S. at 451). As a music publishing company, Zomba is in the business of licensing its works for profit. (R. 47, Declaration of Mariola Kalinska, ¶ 2). Any unauthorized use of those works affects the potential market for the copyrighted musical compositions.

Moreover, Zomba licenses its musical compositions for karaoke use and has done so since 1992. (Id. at ¶ 2 & Ex. A). Zomba has licensed more than one thousand musical compositions for karaoke use. (Id. at ¶ 3). Those licenses result in Zomba receiving royalties for each product sold embodying a Zomba composition. (Id. at ¶ 4).

The Sixth Circuit has held that this exact scenario "negates" a finding of fair use. Princeton Univ. Press, 99 F.3d at 1388 ("the selling of permission to reproduce portions of the works . . . and the likelihood that publishers will license such reproduction is a demonstrated fact," thus "the potential for destruction

of this market by widespread circumvention of the plaintiffs' permission fee system is enough . . . 'to negate fair use.'").

Panorama also implied below that its use will increase the value of Zomba's copyrights by creating an interest in the original recordings. One district court rejected that very argument:

> Any allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works. This would be so even if the copyrightholder had not yet entered the new market in issue, for a copyrightholder's "exclusive" rights, derived from the Constitution and the Copyright Act, include the right, within broad limits, to curb the development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable. Here, moreover, plaintiffs have adduced substantial evidence that they have in fact taken steps to enter that market by entering into various licensing agreements.

UMG Recordings v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (citations omitted).

The Sixth Circuit agreed, explaining:

> While this argument might make sense if the copyrights at issue were copyrights of sound recordings, that is not the case, and Panorama

> offers no evidence that unlicensed copying of Zomba's musical compositions spurs demand for additional licensing, or even any logical reason why it could.

(Opinion, Apx. 16a, n.8).

Because the Sixth Circuit correctly found that all four fair-use factors weigh against Panorama, the Sixth Circuit was correct in affirming the District Court's decision that Panorama's use of Zomba's compositions was not fair. The Sixth Circuit's decision has been followed by the Ninth Circuit and is consistent with an earlier decision of the Second Circuit. Therefore, the lower courts' rejection of Panorama's fair-use defense does not warrant review.

5. Panorama's Defenses of Compulsory License and *De Minimis* Use Were Not Only Waived but Are Inapplicable.

Panorama asserted for the first time on appeal that the compulsory mechanical-licensing scheme in Section 115 of the Copyright Act should apply to karaoke licenses and that, therefore, Panorama's use of the lyrics is *de minimis*. The Sixth Circuit correctly refused to consider either defense because Panorama waived them by failing to assert them in the District Court. (Opinion, Apx. 10a, n.6).

In any event, Panorama's arguments fail. First, Section 115, which subjects phonorecords to a compulsory-licensing scheme, does not apply to audiovisual works such as karaoke devices. Leadsinger, Inc., 512 F.3d at 526 (citing 17 U.S.C.

§§ 101 and 115); see also ABKCO Music, Inc., 96 F.3d at 63, n.4. Section 115 does not entitle karaoke manufacturers to a compulsory license to display song lyrics in real time with sound recordings. Leadsinger, Inc., 512 F.3d at 527-28.

Second, a *de minimis* analysis focuses on the amount of the original work that is included in the copy at issue. Gordon v. Nextel Communs., 345 F.3d 922, 924 (6th Cir. 2003). Panorama admitted that its products contain the entirety of the copyrighted work. (R. 28, Summary Judgment Memo. at 16).

Finally, even if karaoke use only required a compulsory license — which it does not, as discussed above — Panorama never sought compulsory licenses for permission to exploit the twenty-six copyrighted musical compositions at issue. (R. 71, Depo. of Laurindo Santos 68:14-17).

B. The Sixth Circuit Correctly Applied This Court's Standard for Reviewing Statutory-Damages Awards.

The Sixth Circuit correctly affirmed the District Court's conclusion that Panorama's infringement was willful.[7] (Opinion, Apx. 17a). Panorama asked the

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[7] Panorama challenged the District Court's finding of willfulness in the Sixth Circuit appeal but has apparently abandoned that challenge in its Petition. The Sixth Circuit correctly concluded that Panorama exhibited a reckless disregard for Zomba's rights, and that, therefore, Panorama's reliance on its fair-use defense was objectively unreasonable. (Opinion, Apx. 19a). As the Sixth Circuit noted, Panorama continued its infringing activity after the

Sixth Circuit to reduce the District Court's statutory-damages award of $805,000 — or $31,000 for each of the twenty-six infringed copyrights — on grounds that the award is excessive and violates Panorama's constitutional rights. The Sixth Circuit correctly denied Panorama's request and affirmed the District Court's statutory-damages award.

Notably, the District Court did not award anywhere near the maximum amount it had the discretion to award under the Copyright Act — $150,000 — instead awarding $31,000 per infringed work, at the lower threshold of heightened statutory damages available for willful conduct. Further, the damages award was multiplied by twenty-six to equal $805,000 only because Panorama infringed not one, but twenty-six, of Zomba's compositions. Thus, once again, Panorama made its own proverbial bed, and Panorama's portrayal of itself as the victim is inaccurate.

District Court entered its consent order forbidding Panorama to do so. (Opinion, Apx. 19a). Panorama's disobedience of the consent order provides clear evidence of willful infringement. See Kepner-Tregoe, Inc. v. Vroom, 186 F.3d 283, 289 (2d Cir. 1999) (holding that defendant's continued infringement of software after plaintiff obtained injunction in separate litigation was the "antithesis of innocence" and "fully justified the district court's award of maximum statutory damages").

1. The Lower Courts Did Not State That Willful Infringement Damages Must Be at Least $30,000 per Infringed Copyright.

As a threshold matter, Panorama suggests that the lower courts required an award of at least $30,000 in statutory damages for each infringed copyright because the infringement was found to be willful. Panorama requests, therefore, that this Court clarify that a finding of willfulness does not require damages of at least $30,000 per infringement.

The Sixth Circuit made no such assumption and correctly determined that the District Court made no such assumption: "To the contrary, Panorama's willfulness prompted the district court to conclude that the maximum penalty for nonwillful infringement was not sufficient given Panorama's conduct." (Opinion, Apx. 21a). Therefore, the requested clarification is unnecessary.

2. The District Court Exercised Sound Discretion in Awarding Damages within the Range Established by Section 504.

The District Court's damages award falls well within the permissible range for willful infringement; thus, the District Court did not abuse its "broad discretion" in awarding $31,000 per infringement. See, e.g., The Walt Disney Co. v. Video 47, Inc., 972 F. Supp. 595, 603 (S.D. Fla. 1996) ("'An award of substantial damages, . . . is appropriate where the Defendant repeatedly violates copyright laws despite

actual knowledge of their licensing requirements.") (citations omitted).

Section 504 of the Copyright Act permits a plaintiff to elect to recover either the actual damages and infringer's profits or statutory damages. See 17 U.S.C. § 504. In this case, Zomba elected to recover statutory damages.[8]

The Copyright Act establishes a range of permissible damages of $750 to $30,000 for each infringed copyright. See 17 U.S.C. § 504(c). For willful infringement, a district court has the discretion to increase statutory damages to $150,000 per infringed copyright. Id. The range of statutory damages was established to "provide the courts with reasonable latitude to adjust recovery to the circumstances of the case." H.R. Rep. No. 94-1476, at 161 (1976).

"The sliding scale for [the amount of] statutory damages is designed in part to allow courts 'to increase the amount of the award in proportion to the number of individual infringements.'" Venegas-Hernandez v. Sonolux Records, 370 F.3d 183, 196 (1st Cir. 2004). Panorama infringed twenty-six of Zomba's copyrights. Zomba requested statutory damages of $150,000 for each infringed copyright. (R. 97, Pretrial Brief at 1). The District Court's award of $31,000 for each

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[8] Zomba's opportunity to elect statutory damages was particularly important here because the District Court concluded that it could not ascertain actual damages. (R. 107, Findings of Fact and Conclusions of Law ¶ 38).

infringed copyright was approximately one-fifth of the damages Zomba requested.

District courts have broad discretion in setting the amount of statutory damages within the damages range prescribed under the Copyright Act. Wildlife Internationale, Inc. v. Clements, 782 F.2d 1044, 1044 (6th Cir. 1985). "The broad discretionary power given courts to make such an award serves the dual purposes of the Copyright Act: to compensate copyright owners and to provide a deterrent for would-be infringers." National Football League v. Primetime 24 Joint Venture, 131 F. Supp. 2d 458, 473 (S.D.N.Y. 2001) (citations omitted).

As this Court has observed, "[e]ven for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." F. W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952). The availability of statutory damages prevents an infringer from benefiting from its wrongful conduct by facing a penalty of only actual damages. See Coleman v. Payne, 698 F. Supp. 704, 707 (W.D. Mich. 1988) ("[T]he defendant 'cannot expect to pay the same price in damages as it might have paid after freely negotiated bargaining, or there would be no reason scrupulously to obey the copyright law.'") (citation omitted).

Courts have exercised their broad discretion to award substantial statutory damages for willful infringement regardless of the "actual damages" at issue. See, e.g., National Football League, 131 F. Supp. 2d at 478-80 (awarding maximum statutory

damages for infringement that occurred after the court enjoined future infringements and placing "little weight on the [plaintiff's] actual damages or [the defendant's] profits in arriving at the appropriate statutory damage award."); The Design Tex Group, Inc. v. U.S. Vinyl Mfg. Corp., No. 04 Civ. 5002 (JSR), 2005 U.S. Dist. LEXIS 18276 (S.D.N.Y. Aug. 22, 2005), ** 2-6 (awarding maximum statutory damages of $150,000, 45 times defendants' profits, where defendants infringed another of the plaintiffs' copyrights after entry of agreed preliminary injunction, and "[t]he defendants' entire business plan seems to involve recklessly borrowing from others' copyrighted [works], allowing them to cheaply and quickly compete" in the marketplace).

Like the defendant in The Design Tex Group, Inc., Panorama's entire business model is premised on having the most popular songs recorded automatically and released quickly and cheaply without paying royalties to the copyright holders. (R. 71, Depo. of Laurindo Santos at 7:9-8:8). This case presents the paradigm for awarding substantial statutory damages under the Copyright Act. Panorama's repeated, continuing, unapologetic and willful infringement of Zomba's copyrights warrants imposition of substantial damages. Such an award furthers the policies underlying the statutory-damages provision of the Copyright Act.

3. The District Court's Damages Award Does Not Violate Panorama's Constitutional Rights.

a. The Sixth Circuit Correctly Held That the District Court's Damages Award Did Not Deprive Panorama of Due Process.

The Sixth Circuit correctly rejected Panorama's argument that the statutory-damages award is grossly excessive and disproportionate and thus violates Panorama's due process rights under the Fifth Amendment. (Opinion, Apx. 22a-26a).

Panorama's argument rests on the faulty premise that, for constitutional purposes, *statutory* damages stand on the same footing as *punitive* damages. The specific constitutional principles governing awards of punitive damages simply do not apply in the context of a carefully crafted scheme of *statutory* damages. The fundamental problem with Panorama's suggested analogy is that, unlike punitive damages — which are potentially unlimited and subject to the unbridled discretion of the jury — copyright statutory damages are strictly limited to specifically defined ranges that Congress established in the Copyright Act. See 17 U.S.C. § 504(c). Because these ranges are prescribed by statute, a jury has *no* discretion to award statutory damages in excess of these carefully circumscribed limits. This crucial difference renders wholly inapposite the constitutional case law that governs the imposition of punitive damages.

The particular set of constitutional rules that governs punitive damages is based *precisely* on the

concern that the award of such damages would otherwise rest on an "*unregulated and arbitrary* use of judicial power" that would violate due process. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 (1991) (emphasis added). These concerns are inapplicable in the context of a system of statutorily prescribed fixed damages. Indeed, in light of the "safeguards in the legislative process," there is a "significant[] differen[ce]" — a constitutional difference — between "review of a jury's award for arbitrariness and *the review of legislation....*" TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 456 (1993) (emphasis added).

Despite this fundamental difference, Panorama nevertheless invites this Court to extend to this statutory-damages case the Court's standard for reviewing punitive damages set forth in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003).[9] But the underpinnings of Gore

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[9] Panorama also relies on this Court's recent decision in Philip Morris USA v. Williams, 127 S. Ct. 1057, 1060 (2007), where the Court held that a punitive-damages award cannot be based on the desire to punish the defendants for harming persons who are not before the court. The Sixth Circuit correctly found Williams inapplicable here because harm to third parties was not a factor in the District Court's decision. (Opinion, Apx. 26a, n.12). Panorama argues that to the extent the District Court cited deterrence as a basis for assessing its statutory-damages award, the award was at least partially on account of "strangers to the litigation" and thus prohibited by Williams. Deterrence of future misconduct is different than the past harm to third parties that this Court addressed in Williams. Panorama admits that the legislative history of the Copyright Act specifically lists deterrence

rested on concerns that have no application in the context of statutory damages.

The thrust of the due-process analysis in Gore was that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* not only of the conduct that will subject him to punishment, but also *of the severity of the penalty* that a State may impose." Id. at 574 (emphasis added). Because statutory penalties provide parties with clear and ample notice of their potential liability, however, this centerpiece of the Gore analysis is simply irrelevant here. The plain language of Section 504 of the Copyright Act was on the books when Panorama decided to embark on its infringing activities. In fact, Panorama was provided with notice of potential damages for willful infringement twice in 2002 but continued its infringing conduct. (R. 100, Damages Hearing Tr. Exs. 1 & 2). Panorama was certainly provided "fair notice" of the dangers of continuing its infringing conduct.

Although inapposite, the factors identified in Gore only further serve to underscore their inapplicability to the issue of statutory damages. In Gore, the Court held that the disparity between a punitive-damages award and the "*civil penalties* authorized or imposed

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as one of the purposes of the statutory-damages provision. (Petition at 26 (quoting Staff of House Comm. on the Judiciary, 87th Cong., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 103 (Comm. Print 1961), reprinted in 3 Omnibus Copyright Revision Legislative History (George S. Grossman ed., 1976)).

in comparable cases" is one of three key "guidepost[s]" for determining whether an award is excessive. 517 U.S. at 575 (emphasis added). Because "'substantial deference' [should be given] to legislative judgments concerning appropriate sanctions for the conduct at issue," the Court reasoned that a common-law punitive-damages award that happens to fall within the range of a statutory penalty for a similar wrong is unlikely to violate due process. Id. at 583. Thus, a punitive-damages award that *exceeds* such a range may still be permissible (depending on a consideration of the other Gore factors), but an award within such a range is presumptively constitutional. This analytical framework is obviously not intended to address the situation in which Congress has itself undertaken to prescribe the permissible ranges of damages. It makes no sense, for example, to ask the circular and tautological question whether a *statutory* damages amount is "greater" than the civil exactions specifically authorized by statute. Id. at 584 (identifying this as the third "guidepost").

The second Gore guidepost — *i.e.*, the disparity between the actual or potential harm suffered and the punitive-damage award — also demonstrates why importing punitive-damages case law into this context would make no sense. Id. at 575. Congress *expressly rejected* the notion that a statutory-damages award should bear some specified proportion to the "actual harm" suffered by the plaintiff when Congress gave copyright holders the statutory right to elect *either* "actual damages and any additional profits of the infringer" *or* "*instead* ... statutory damages." 17 U.S.C. § 504 (emphasis added). Congress gave plaintiffs this choice "precisely because of the

difficulties inherent in proving actual damages and profits." Yurman Design, Inc. v. PAJ, Inc., 93 F. Supp. 2d 449, 462 (S.D.N.Y. 2000), aff'd in relevant part, rev'd on other grounds, 262 F.3d 101 (2d Cir. 2001); see also Columbia Pictures Industries, Inc. v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186, 1194 (9th Cir. 2001) ("A plaintiff may elect statutory damages 'regardless of the adequacy of the evidence offered as to his actual damages and the amount of the defendant's profits'") (citation omitted). It is one thing to say, as the Court has said, that a common-law punitive damages award must bear some reasonable relationship to the harm suffered; it is quite another to say that Congress cannot undertake to impose a fixed range of damages awards, particularly in a context in which it has determined that proof of damages can be difficult to quantify.

Put simply, the Gore test was and is designed to address the validity of *otherwise unconstrained* common-law *punitive-damages* amounts awarded by juries; it was not intended, nor is it suited, for second-guessing the legislative judgments made by Congress itself. In fact, this Court has historically given broad deference to Congress in copyright cases. See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) ("As we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause....The wisdom of Congress' action...is not within [this Court's] province to second guess."). This deference is important because Congress has already established the "reasonable" damages range for willful copyright infringement. Congress expressly stated that the

range of statutory damages was established to "provide the courts with ***reasonable*** latitude to adjust recovery to the circumstances of the case." H.R. Rep. No. 94-1476, at 161 (1976) (emphasis added). If a district court awards damages within the range set forth in Section 504, that award is presumptively reasonable because Congress has already stated that damages under Section 504 are "reasonable."

Notably, the Sixth Circuit did not, by refusing to apply the punitive-damages cases here, refuse to review the District Court's statutory-damages award entirely. The Sixth Circuit instead applied the standard this Court established for reviewing statutory-damages awards in St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919). This Court held in Williams that, in such cases, the appropriate inquiry is whether the awards are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." Id. at 67. The Sixth Circuit explained that such review "is extraordinarily deferential — even more so than in cases applying abuse-of-discretion review." (Opinion, Apx. 24a (citing Douglas v. Cunningham, 294 U.S. 207, 210 (1935)).

The Sixth Circuit, observing that this Court in Williams affirmed a 113:1 ratio, concluded that the 44:1 ratio here "was not sufficiently oppressive to constitute a deprivation of due process" and is not unacceptable. (Opinion, Apx. 25a-26a). The Sixth Circuit's conclusion is fully consistent with the decisions of other courts. See Columbia Pictures Industries, Inc., 259 F.3d at 1195 (upholding $31.68 million statutory-damages award against individual

defendant for willful infringement of 404 copyrighted works, because it was "well within the statutory range for willful infringement"); Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., 74 F.3d 488, 496-97 (4th Cir. 1996) (refusing to overturn statutory-damages award that was 40 times greater than infringer's actual profit); UMG Recordings, Inc. v. MP3.Com, Inc., No. 00 CV 472 JSR, Copy. L. Rep. (CCH) P28141, 2000 U.S. Dist. LEXIS 13293, at ** 15-18 (S.D.N.Y. Sep. 6, 2000) ($118 million statutory-damages award against online music service warranted even though no actual damages proven).

In affirming the District Court's damages award, the Sixth Circuit did not look "for a comfortable formula," as Panorama alleges. (See Petition at 28). Instead, the Sixth Circuit considered the repeated, unapologetic manner in which Panorama infringed Zomba's copyrights. Such conduct warrants strong punishment and deterrence. Moreover, Panorama has been making substantial sums for the past eight years by exploiting unlawfully the rights of others. (R. 36, Ex. A, documents "Panorama 00006-0148"). After having heard all the evidence and gauging the credibility of the witnesses, the District Court did not abuse its discretion in awarding $31,000 for each infringed copyright.

b. The Sixth Circuit Correctly Found the Excessive-Fines Clause Inapplicable to This Civil Case.

Panorama argues — without citing any cases addressing statutory damages under the Copyright Act — that the award of damages here amounts to an

"excessive fine" and is thus prohibited by the Eighth Amendment to the Constitution.

The Sixth Circuit correctly rejected Panorama's argument based on this Court's decision in Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989). (Opinion, Apx. 22a).

This Court in Browning-Ferris expressly rejected the application of Eighth Amendment principles to civil actions between private parties: "[The Eighth Amendment] does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." Id. at 264. Because the government will not receive a share of the damages awarded to Zomba, the Eighth Amendment analysis ends there. See also United States v. Bajakajian, 524 U.S. 321, 327 (1998) (the word "fine" in this context means a payment to the government).[10]

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[10] Panorama makes a lengthy policy argument that the Excessive Fines Clause should be extended to civil damages in copyright cases but cites no cases supporting its argument. (See Petition at 29-32). Panorama's argument that statutory copyright damages should be considered a payment to the government under the clause because copyrights go to the holder of a government-issued copyright is a leap in logic. In any event, this case, in which the remedy was appropriate in light of Panorama's egregious conduct, is an inappropriate vehicle to consider such extension. Panorama also argues that the Court should grant its Petition because "copyright holders are flooding the courts with statutory damages cases." (Petition at 32-33). The cases Panorama cites are inapposite to the facts in the instant case.

Panorama also suggests that the Sixth Circuit, by its holding, set an incorrect precedent that the Excessive-Fines Clause does not apply in civil cases. The Sixth Circuit did no such thing, instead invoking this Court's holding in Browning-Ferris that the clause "does not constrain an award of money damages in a civil suit ***when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.***" (Opinion, Apx. 22a (quoting Browning-Ferris, 492 U.S. at 264) (emphasis added)).

II. The Sixth Circuit Correctly Denied Panorama's Motion to Take Judicial Notice.

After Zomba filed its response brief in the Sixth Circuit, Panorama sought to admit into the record evidence supporting its defense of "misuse of copyright," a defense it asserted for the first time on appeal, such evidence including five unauthenticated Internet articles written after Zomba initiated this action and that relate to the merger of Zomba's parent corporation and documents related to other lawsuits filed by Zomba. (Panorama's Petition Appendix at 55a, 58a, 61a, 66a, 84a & 86a).

The Sixth Circuit correctly denied Panorama's Motion. The evidence existed during the District Court case but was not part of the District Court record and thus is not properly part of the appellate record. See Fed. R. App. P. 10(a). Further, the late-proffered evidence was not probative of any issues before the Sixth Circuit under Fed. R. Evid. 201(a). The articles relate to the merger creating Zomba's current parent company, Sony BMG. Respondents

Zomba Enterprises, Inc. and Zomba Songs, Inc. are separate legal entities and continue to own the copyrights at issue. (R. 83, Depo. of Wade Leak at 19).

Finally, the proffered evidence, Internet articles apparently offered to prove the statements made in those articles, is 1) inadmissible hearsay under Fed. R. Evid. 802 and 2) not authenticated as required under Fed. R. Evid. 901.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 07-1028

FILED
APR 22 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

PANORAMA, INC.,

Petitioner,

v.

ZOMBA ENTERPRISES, INC.
and ZOMBA SONGS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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REPLY BRIEF OF PETITIONER PANORAMA, INC.

I. ZOMBA'S EMPHASIS ON PANORAMA'S "WILLFULNESS" INDICATES THE PUNITIVE NATURE OF THE AWARD THAT SHOULD INVOKE 5TH AND 8TH AMENDMENT SCRUTINY.

By painting Petitioner Panorama as an extremely "willful" infringer, and seeking to justify the large award by reference to Panorama's prior civil contempt,[1] Zomba amply illustrates why the award sub judice must be considered as punishment, and therefore within the ambit of the Fifth and Eighth Amendment limitations on punishment. The more scorn they heap upon Petitioner, the more the award appears to be virtually pure punishment, and should be judged as such. Moreover, Panorama's ultimate Chapter 11 bankruptcy filing, after it was unable to afford counsel at the critical stage of the damages assessment, should illustrate the drastic effects of statutory damage litigation itself apart from the actual award, with its expense and attorney fee shift, on small closely held companies and individuals.[2]

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[1] Panorama's contempt of a consent decree was already punished by entry of default as to damages.

[2] Luther Campbell, the rapper/petitioner in *Campbell v. Acuff Rose Music*, 510 U.S. 569, 114 S. Ct. 1164 (1994), was at least as willful as Petitioner here - he sought a license which was refused, and proceeded to use the copyrighted composition commercially anyway. All vigorously litigated Fair Use cases must perforce be "willful", lest there ever be any Fair Use adjudications at all.

Petitioner extensively explicated his belief in Fair Use at his deposition, so the assertion of the defense by Panorama was not as disingenuous as Zomba describes. 17 U.S.C. §107 does not require the Fair User to have knowledge of the statute. Besides, the exercise of First Amendment rights, which are closely bound up with copyright, always requires some willful conduct. Also, one must sometimes violate a decree or injunction in order to challenge it. The issue is the extent of the punishment.

Since Panorama and its employees have released "thousands" of copyrighted compositions, it still risks further theoretical liability of hundreds of millions of dollars in statutory damages, plus direct criminal liability (as 17 U.S.C. §506 provides up to 10 years imprisonment for "[any] person who willfully infringes a copyright...for purposes of commercial advantage or private financial gain".)

"Willfulness" is nevertheless an elusive standard. Petitioner fails to see the difference between his conduct compared to the conduct, say, of the infringer in *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996), who was found not to be willful in xeroxing course books. The situation is further confounded by the Fair Use "teaching" example in the language of 17 U.S.C. §504, which could lead a man of ordinary intelligence to conclude his actions in making disks that amateurs could use to improve vocal skills were legal.[3]

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[3] The standard for vagueness was defined by the U.S. Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972): "[A]

The Sixth Circuit has taken too restrictive a view of the Fifth Amendment punitive damage cases decided by this Court. All of those cases stem from the language of the Fifth Amendment, which does not mention civil juries, nor state courts at all:

> nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; (emphasis supplied) nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment V.

The Fifth Amendment, to be sure, is not directed to the States, but to federal power. The punitive damage limitation cases decided by this Court were decided under the Fourteenth Amendment, which has similar language as the Fifth ("...nor shall any State deprive any person of life, liberty, or property, without due process of law;" *U.S. Constitution, Amendment XIV.).*

Yet the policies of *Gore* and *State Farm* apply directly. It makes no difference that we are construing a statute (and a bench verdict) here, rather than a jury verdict; the issue is exercise of governmental power. As this Court noted in *BMW of North America v. Gore*, 517 U.S. 559 (1996), note 17,

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statute is unconstitutionally vague if it either: (1) fails to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited'; or (2) fails to 'provide explicit standards for those who apply [the law].'

> "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute. *See New York Co. Times v. Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("regulation can be as effectively exerted through an award of damages as through some form of preventive relief").

Likewise, it should be noted that "civil penalties" are expressly within *BMW v. Gore's* ambit (citation omitted):

> The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against "judgments without notice" afforded by the Due Process Clause, is implicated by civil penalties. (*BMW v. Gore*, note 22)

Moreover, to the extent that statutory damages punish and deter future conduct, they are within the reach of *BMW v. Gore* and *State Farm*:

> By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. *Cooper Industries, supra*, at 432; see also *Gore, supra*, at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19

(1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence").

State Farm v. Campbell, 538 U.S. 408 (2003)

Just as *Gore* and *State Farm* were decided under the 14th Amendment, which covers more than just jury trials, the award *sub judice* ought to be covered by the similar language of the Fifth Amendment, having emanated from a federal statute and federal court. It is submitted that it is not fair notice to say that one can be fined in federal court for copyright infringements anywhere from $250 to $150,000, plus unspecified counsel fees, unless they be found later on to be a Fair User, which is a case by case determination with no hard and fast rules.

Likewise, the Sixth Circuit has taken too restrictive a view of the few Eighth Amendment Excessive Fine cases that this Court has decided. To say, as did the Sixth Circuit, that "the Excessive Fines Clause does not apply to money damages in a civil suit" is taking a position never held by this Court. The clear arc of these cases, which Zomba glosses over, is that over time, more, not less, government activity is being limited by the Excessive Fines Clause. As this Court stated in *Austin v. United States*, 509 U.S. 602 (1993) (citations omitted),

> "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." "It is commonly understood that civil proceedings may advance punitive and remedial goals, and, conversely, that both punitive and remedial goals may be

> served by criminal penalties." Thus, the question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment. [n.6]

The only novel question here, which Zomba won't discuss, is whether a government empowered monopolist (for indeed copyright is a form of monopoly) may wield powers of punishment, which, if exercised by the sovereign, would be a prohibited excessive fine.

II. UNDER CAMPBELL, THERE IS NO PRESUMPTION AGAINST FAIR USE BECAUSE OF COMMERCIALITY, ONLY A PRESUMPTION OF MARKET HARM IN A CASE OF "MERE DUPLICATION", WHICH THIS IS NOT.

Zomba (and the Sixth Circuit) states that "Panorama's use of Zomba's works is presumptively unfair" (Zomba brief, p. 17). But, the case that Zomba cites for that proposition, *Campbell*, 510 U.S. at 591, simply states that there is "no presumption of interference or market harm" ...[in any]... "case involving something beyond mere duplication".[4] Zomba then proceeds to mischaracterize this case as one of mere duplication, which it is not, and then, relying on

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[4] Panorama re-records the musical composition with new musical performances sans lyrics, and juxtaposes the printed lyrics for presentation on a bluescreen - not a case of "mere" duplication", such as record piracy.

language[5] in *Sony*, concludes that "Panorama's Use of the Compositions is Purely Commercial and Presumptively unfair."

However, this Court said just the opposite in *Campbell*. As Justice Souter succinctly put it,

> "the Court of Appeals faulted the District Court for "refus[ing] to indulge the presumption" that "harm for purposes of the Fair Use analysis has been established by the presumption attaching to commercial uses....The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew's Fair Use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use. The court then inflated the significance of this fact by applying a presumption ostensibly culled from *Sony*, that "every commercial use of copyrighted material is presumptively...unfair ...." *Sony*, 464 U.S., at 451. In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred.

They did it again. Not only did the Sixth Circuit get hung up on commerciality, ("...Accordingly, Panorama's use is commercial in nature, a fact militating against its fair use defense." A. 14a), it also shifted the burden to Panorama to disprove market harm, citing *Princeton Univ. Press*, its own precedent

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[5] "This Court has held that purely commercial use is presumptively unfair", citing *Sony Corp. of America v. Universal Studios Inc.*, 464 U.S. 417 (1984) (Zomba brief, p. 12 – 17).

(A. 15a). This cannot be squared with Justice Souter's opinion in *Campbell* that there is "no presumption of interference or market harm" ...[in any]... "case involving something beyond mere duplication."

III. THE SIXTH CIRCUIT AND NINTH CIRCUIT ARE AT ODDS OVER ANALYZING THE TRANSFORMATIVE NATURE OF THE USE.

Campbell v Acuff Rose is not primarily a case about "parody" - it is a case about Fair Use and its myriad incarnations, parody being only one. The Ninth Circuit understood this. The most that Zomba can say about the similarities of the Ninth Circuit Fair Use cases (*Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007), and *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003)) is that they both acknowledge that the Fair Use factors must be applied to the facts of each specific case. (Zomba's Brief, p.17). Their summary description of both cases is that "the uses were fair primarily based on the transformative nature of the uses, which served the different functions of improving access to information on the internet versus artistic expression.... The Ninth Circuit also concluded that the search engine's uses of the images did not harm the photographer's market for the images." (Zomba's Brief, p. 17).

By this standard, Panorama should have been found to be a Fair User. One could just as easily say that Panorama's transformation of the material (recording a new performance without lyrics, and embedding the recording on a disk with printed lyrics momentarily displayed on a blue screen or

background, in order to allow persons to sing along with the song without memorizing the lyrics) served the different functions of improving access to musical information for purposes of preparing for live performance versus artistic expression, and the use did not harm the market for publisher's songs (which under *Campbell* would be Zomba's burden of proof anyway. Moreover, Zomba does not respond to the point that the Ninth Circuit considers the end user as well, since the "purposes of copyright", as expressed in Article I, clause 8, must always be considered. As Justice Souter noted in *Campbell* (citations omitted),

> Similarly, Lord Ellenborough expressed the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it when he wrote, "while I shall think myself bound to secure every man in the enjoyment of his copy right, one must not put manacles upon science." In copyright cases brought under the Statute of Anne of 1710, [n.6] English courts held that in some instances "fair abridgements" would not infringe an author's rights, *see* W. Patry, *The Fair Use Privilege in Copyright Law* 6-17 (1985) (hereinafter Patry); Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1105 (1990) (hereinafter Leval)...

Zomba and the Sixth Circuit state that consideration of the end user in Fair Use analysis is "largely irrelevant" Yet they acknowledge that a commercial end use by the consumer would have rendered the manufacturer's infringement unfair in *Sony*. They can't have it both ways. The Ninth Circuit considered the end users.

Fair Use analysis requires that the "purposes of copyright" be considered, yet the Sixth Circuit and Zomba won't acknowledge that one of the purposes of copyright, at least as expressed in 17 U.S.C. §115, is to prevent a publisher monopoly, and allow anyone to re-record a musical composition, with or without lyrics. So, without considering other policies expressed in other parts of the statute, without considering the effects upon and conduct of end users, with an evidentiary presumption of market harm never authorized by this Court, the Sixth Circuit got it wrong again.

No wonder they missed the obvious transformative aspects Karoake on at least two levels; the manufacturer and the consumer. In creating an otherwise lawful rerecorded cover version of the musical composition so that it is recognizable sans lyrics, and displaying the lyrics momentarily on a blue screen or background, so that the end user can instantly sing along with his favorite melodies, karaoke fulfills a different, limited purpose than the music it is based upon. That's the Karoake transformation that separates it from a simple audio disk with the vocals recorded aurally, which 17 U.S.C. §115 nonetheless authorizes. The effect that the Karoake disk may have on an end user is another transformation. Both must be considered as this court did in *Sony*, and as the Ninth Circuit did in *Arriba Soft* and *Perfect 10*.

It is beyond cavil that one can use a karaoke disk to learn to sing a song, a kind of teaching. Likewise, It cannot be seriously maintained that Karoake cannot possibly "teach" because it primarily "entertains", as

Zomba and the Sixth Circuit maintain. That is a false dichotomy. Anyone who has enjoyed a good speech, seminar, or music lesson surely knows that good teaching is often entertaining, and vice versa.

IV. MORGAN INTERACTIVE, LEADSINGER, AND EMI ENTM'T WORLD ALL TAKE DIFFERENT APPROACHES TO FAIR USE, WHICH ARE NOT RECONCILABLE.

Since the filing of the Petition herein, Appellee Zomba's corporate affiliate, BMG Music Publishing and Zomba Songs, Inc., have obtained an opinion in a karaoke case, *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522 (9th Cir. 2008), from the Ninth Circuit, that follows the Sixth Circuit decision under consideration herein.

> The only other circuit court to address Fair Use in the context of karaoke reached the same conclusion. In *Zomba Enterprises*, the defendant, a karaoke company, argued that its use of copyrighted musical compositions was fair. 491 F.3d at 581. The Sixth Circuit held that the defendant's use of copy-righted musical compositions did not constitute "fair use." *Id.* at 584. In assessing the first § 107 factor, "the purpose and character of the use of the work at issue," the Sixth Circuit characterized the defendant's use as "commercial" and rejected the argument that karaoke is a teaching tool. *Id.* at 582-83.

So, to the extent that the Sixth Circuit erred in its Fair Use analysis, *Leadsinger* was incorrectly decided

by the Ninth Circuit, and now stands in opposition to *EMI Entm't World, Inc. v. Praddis Music, Inc.*, 2007 U.S. Dist. Lexis 37074, on the question whether or not karaoke needs a Film synch license. To the extent *Morganactive Songs v. K&M Fox, Inc.*, 77 U.S.P.Q.2d. 1064 (S.D. Ind. 2005), a lower court karaoke case relied also upon by Zomba, did not consider the overarching purposes of copyright, it, too, was wrongfully decided. The court there made a specious creative value judgment out of whole cloth - "this is not parody, its imitation". Petitioner here does not claim that karaoke is parody, simply Fair Use - that is fair for it to manufacturer a karaoke disk that doesn't compete with the main market for the recording.

In sum, allowing protection for the expression of ideas should not prevent the free flow of ideas. Since the expression of an idea stems from the thought behind the idea, when the thought behind the idea differs so does the expression. The idea behind karaoke is not to create a musical composition but to create a different medium for the expression of a musical composition. Karaoke promotes the progress of the useful art of singing. Being a medium for artistic expression, it is new expression for a new and different purpose. Karaoke is interactive in nature, much like the internet is interactive in nature and has created its own culture. It is a worldwide recognized phenomena which attests to its transformative value. Karaoke provides a different type of societal benefit than does the original because the idea for karaoke stems not from an idea for a musical composition but an idea to create a medium for expression. For that idea to express itself with its own unique expression it needs an existing recognizable work, as does parody, to do so.

One might ask does parody provide more societal benefit than karaoke, and should a handful of foreign conglomerates who own copyrights be allowed to extend their monopoly to control it?

Respectfully submitted,

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